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# BAIL REFORM

# HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

## S. 440, S. 482, S. 1253, S. 1554

BILLS TO AMEND THE BAIL REFORM ACT OF 1966

SEPTEMBER 17 AND OCTOBER 21, 1981

**Serial No. J–97–56**

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# BAIL REFORM

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THURSDAY, SEPTEMBER 17, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 2:15 p.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Hatch and Senator Leahy.

Staff present: Randy Rader, counsel; Steve Markman, general counsel; Peter Ormsby, professional staff member; and Claire Greif, clerk.

## STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE ON THE JUDICIARY

Senator HATCH. The Subcommittee on the Constitution of the Committee on the Judiciary will come to order.

From 1979 to 1980 violent crimes occurred at an increased rate of 13 percent nationwide, according to Justice Department figures. With danger to lawful citizens increasing at these alarming rates, Federal courts and Federal laws must find ways to make neighborhoods safer.

At this point, I will put the remainder of my statement in the record. It gives a lot of statistics and background material pertaining to today's hearing. I will do this rather than take the time of our distinguished Senators who are here.

[The material follows:]

# STATEMENT OF CHAIRMAN ORRIN G. HATCH
## HEARINGS ON BAIL REFORM
## SEPTEMBER 17, 1981

From 1979 to 1980, violent crimes occurred at an increased rate of 13% nationwide, according to Justice Department figures. With danger to lawful citizens increasing at these alarming rates, Federal courts and Federal laws must find ways to make neighborhoods safer.

A study performed in the District of Columbia at roughly the same time that these crime statistics were tabulated suggests that reforming bail procedures could improve community security. That study, entitled "Pretrial Release and Misconduct in the District of Columbia," found that 13% of felony suspects released after arrest were apprehended for another crime committed while they were free on bail. Although this study and others like it might suggest the relevancy of community security to a bail proceeding, current law prevents a Federal judge from considering threats to the community when setting conditions for pretrial release. Under the Bail Reform Act of 1966, the only issue a Federal judge may consider in determining bail in non-capital offenses is what conditions will reasonably assure that the suspect will appear for trial.

The failure of Federal criminal law to allow consideration of dangerousness in bail proceedings has caused several arbitrary results in practice. For instance, Former U.S. Attorney for the District of Columbia, Earl J. Silbert, states:

> The utter absurdity of this /law/ is best demonstrated by the argument defense lawyers routinely make and judges too often accept: The defendant should be released because his extensive record of criminal arrests and convictions for serious crimes without any charge of flight is persuasive proof that he appears in court as required. The logical extension of this argument is that the more crimes a defendant has committed, the stronger his argument for release.

Over ten years ago, after working with the 1966 Bail Reform Act only a few years, Harold Greene, Chief Judge of the District's Court of General Sessions, made a similar point in these words:

> Under the present law, a defendant with steady roots in the community . . . must be released on personal recognizance with minimal conditions or no conditions at all, even if he is charged with a crime as serious as armed robbery, and

> EVEN IF HE HAPPENS TO HAVE A RECORD OF FIVE OR SIX PRIOR SERIOUS FELONY CONVICTIONS. BY CONTRAST, A DEFENDANT FROM OUT OF TOWN WITHOUT A PRIOR RECORD WHO IS CHARGED WITH AN OFFENSE AS MINOR AS ATTEMPTED PETIT LARCENY IS TECHNICALLY REQUIRED TO BE SUBJECTED TO THE MOST SEVERE CONDITIONS, INCLUDING HIGH MONEY BAIL. THIS KIND OF DISPARITY MAKES SENSE ONLY IF THE DANGER OF FLIGHT OR NON-APPEARANCE IN COURT IS DEEMED TO CONSTITUTE THE SOLE VALID CRITERION IN THE SETTING OF BAIL. I BELIEVE THAT, TO THE CONTRARY, WHEN BAIL IS SET, THE PROTECTION OF THE COMMUNITY FROM POTENTIALLY DANGERIOUS CRIMINALS SHOULD BE GIVEN EQUAL WEIGHT WITH THE DANGER OF NON-APPEARANCE. (HEARINGS OF THIS SUBCOMMITTEE, 1969)

Even these persuasive statements, however, do not describe the most unreasonable legal distinction made by the current bail law. The current law continues to allow the court to consider risk to the community when setting bail for capital offenses. Therefore, the legal standards for bail may be determined by whether or not the wound inflicted by the prisoner is fatal. If the victim of the offense is still clinging to life when the suspect is brought before the court to request bail, the court may only consider the likelihood that the defendant will show for trial. If the victim has died moments before the suspect's appearance in court, the court may consider dangerousness. In other words, the test of law for allowing a dangerous suspect to return to the community pending trial is more dependent upon the death date of his last victim than considerations of community safety.

No wonder many judges laboring under this law admit using "extreme rationalizations in circumventing" this policy. As Judge Tim Murphy, formerly on the Court of General Sessions, stated before a House Committee, "Your cannot expect judges to follow the letter of a law that requires them to turn many dangerous criminals loose day after day."

Before turning to our witnesses, we should briefly review what the Constitution says about bail. The Eighth Amendment says directly: "Excessive bail shall not be required." This language traces its origins to the Statute of Westminster in 1275 which granted bail and included a list of violent offenses for which no bail was possible. The 1275 Statute was carried over into the Bill of Right in 1639, which in turn was copied into the Virginia Declaration of Rights. The Virginia language became the basis for James Madison's recommendation which was accepted verbatim by the First Congress as the Eighth Amendment. That same First Congress authorized the denial of bail in all capital offenses in the Judiciary Act ~~of~~ 1789. At that time, arson, rape, burglary, and robbery, in addition to murder, were capital offenses. Although the definition of capital offenses has changed for reasons unrelated to questions of bail and community security, the law today still allows detention of the accused in capital offenses without bail. This history demonstrates a consistent pattern from 1275 to 1966 of considering danger to the community in setting bail.

Although the Supreme Court said in 1951 said that "unless the right to bail before trial is preserved, the presumption of innocense, secured only after centuries of struggle, would lose its meaning," (Stack v. Boyle, 342 U.S.1) the same session of the Court clarified that :

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. . . Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. 342 U.S. 524 (1952), Carlson v. Landon.

Accordingly, although bail may not be excessive, there is no absolute right to bail. Certainly dangerousness of the defendant is not barred by the Constitution as a consideration in bail proceedings.

This history brings us to our present hearing. We intend today to look again at the standards for bail which prevailed from 1275 until 1966 and examine the reasons they were changed. We want to understand the current facts, such as a 1978 study by the D.C. Bail Agency that showed that 65% of those released after an arrest for auto theft were taken into custody on another auto theft while out on bail. We want to examine what effect the 1966 law has had on crime and crime deterrence. We want to study the legal distinctions made under current law. We intend to uncover the difficulties a judge must experience in dealing with these standards. We plan to reach some conclusions about the variety of bills introduced by several Senators to address the problems I have outlined. Thus I see this hearing as just another step in a long trail of history which has ackowledged the community's right to self-defense in bail proceedings.

97TH CONGRESS
1ST SESSION

# S. 440

To make certain amendments to title 18 relating to bail.

---

IN THE SENATE OF THE UNITED STATES

FEBRUARY 6 (legislative day, JANUARY 5), 1981

Mrs. KASSEBAUM introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

# A BILL

To make certain amendments to title 18 relating to bail.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That subsections (a) and (b) of section 3146 of title 18, United States Code, are amended to read as follows:

"(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be admitted to bail. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the judicial officer will insure the presence of the defendant. The following factors shall be considered as bearing on the appearance of the defendant—

"(1) the nature and circumstances of the offense charged;

"(2) whether the defendant is charged with or has been previously charged with offenses involving violence or threats of violence to persons or property, or offenses involving the possession of instrumentalities or substances capable of harming persons or property;

"(3) the weight of the evidence against the defendant;

"(4) the severity of the penalties for the offenses charged;

"(5) the defendant's family ties, employment, and financial resources;

"(6) the length of the defendant's residence and employment in the community;

"(7) the defendant's arrests and convictions for violations of criminal laws;

"(8) the defendant's record of appearances at court proceedings;

"(9) the defendant's character in the communities in which he has lived; and

"(10) the defendant's mental condition and history of drug-related problems.

Other factors may be considered by the judicial officer if they relate to the defendant's presence.

"(b) The judicial officer may release the defendant on his personal recognizance only if the defendant produces convincing evidence that—

"(1) he has no prior arrests or convictions for criminal violations;

"(2) he has demonstrated a responsible record of employment;

"(3) he has family members which he supports in a satisfactory manner;

"(4) he is a person of good character in the communities in which he has lived; and

"(5) the crime or crimes charged—

"(A) do not involve acts or threats of violence to persons or property;

"(B) do not involve the possession of instrumentalities or substances capable of harming persons or property;

"(C) do not involve trafficking in drugs, extortion, or racketeering; and

"(D) do not carry an aggregate sentence of more than five years' confinement.

"(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

"(d) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

"(e) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.".

SEC. 2. Section 3147 of title 18, United States Code, is amended to read as follows:

"(a) In any case in which a person is detained pursuant to section 3146 of title 18, United States Code, an appeal may be taken to the court having appellate jurisdiction over such court.

"(b) Any order appealed pursuant to this section shall be reversed only if there is a clear abuse of judicial discretion in applying the standards set forth in section 3146. If the order is reversed, the court shall remand the case for further hearing.

"(c) Any appeal pursuant to this section shall be disposed of not later than thirty days from the filing of such appeal.".

SEC. 3. Section 3148 of title 18, United States Code, is amended to read as follows:

**"§ 3148. Release in capital cases or after conviction**

"(a) A defendant charged with a capital offense or who has been convicted of an offense and is either awaiting sentence or sentence review or has filed an appeal or a petition for a writ of certiorari, has no right to bail. In the case of a defendant who has been convicted of an offense, the trial court may admit the defendant to bail in such amount as in the court's judgment will insure the presence of the defendant after considering the same factors as for bail prior to conviction set forth in section 3146. The court may release the convicted defendant on his personal recognizance only if the defendant produces convincing evidence to satisfy the requirements for personal recognizance before conviction set forth in section 3146, and, in addition, the court specifically finds that there is substantial likelihood that the conviction will be reversed.

"(b) If bail is fixed for a convicted defendant pending sentence or appeal, the defendant may appeal the bail order to the court having appellate jurisdiction which shall reverse the bail order of the trial court only for a clear abuse of judicial discretion.

"(c) Any appeal pursuant to this section shall be disposed of within thirty days from the filing of such appeal.".

SEC. 4. Paragraph 2, subsection (e) of rule 46 of the Federal Rules of Criminal Procedure is amended to read as follows:

"(2) Setting aside. When the ends of justice do not require enforcement of the forfeiture, the court may direct that the forfeiture be set aside upon such conditions as the court may impose. However, the court shall not set aside the forfeiture if it is shown that the failure of the defendant to appear was the result of his own willful criminal conduct during the period of his release.".

○

97TH CONGRESS
1ST SESSION

# S. 482

To amend the Bail Reform Act of 1966 to require the judicial officer making the bail determination to detain those persons who cannot be released without endangering the safety of other persons or the community.

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 17 (legislative day, FEBRUARY 16), 1981

Mr. BUMPERS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

# A BILL

To amend the Bail Reform Act of 1966 to require the judicial officer making the bail determination to detain those persons who cannot be released without endangering the safety of other persons or the community.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Bail Reform Act Amendments of 1981".

SECTION 1. Section 3146 of title 18, United States Code, is amended to read as follows:

**"§ 3146. Release prior to trial**

"(a) A person charged with an offense shall, at his appearance before a judicial officer, be ordered detained or released pending trial, upon the conditions specified by the judicial officer.

"(b) In making determinations regarding detention and release, the judicial officer shall consider whether the person charged is likely to appear as required and whether he poses a danger to the safety of any other person or to the community.

"(c) A person charged with an offense shall be ordered released pending trial on his personal recognizance, or upon the execution of an unsecured appearance bond in an amount specified, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community. If either such determination is made, the judicial officer shall impose the least restrictive conditions of release that will reasonably assure the safety of other persons and the community, and that will reasonably assure the appearance of the person for trial. If the judicial officer is unable to find that any combination of conditions of release will be sufficient, the person shall be ordered held in detention pending trial.

"(d) No financial condition may be imposed to assure the safety of any person or the community.

"(e) In making determinations regarding whether the person poses a danger to the safety of any other person or the community, or whether the person is likely to appear as required, the judicial officer shall, on the basis of available information take into account—

"(1) the nature and circumstances of the offense charged;

"(2) the weight of evidence against the person; and

"(3) the history and characteristics of the person, including his character, mental condition, family ties, employment, past conduct, use of alcohol, history of violent behavior, length of residence in the community, financial resources; record and nature of convictions, record of appearance, flight to avoid appearance or nonappearance at court proceedings; illegal drug use; whether he was on probation, parole, or other release pending completion of sentence for conviction under Federal, State, or local law at the time of the current arrest; and whether he was on pretrial release or release pending sentence or appeal for an offense under Federal, State, or local law at the time of the current arrest.

"(f) The judicial officer shall provide as mandatory conditions of release for any person who is ordered released, that the person—

"(1) not commit a Federal, State, or local crime during the period of his release;

"(2) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, without a prescription from a physician;

"(3) refrain from possessing a firearm, destructive device, or other dangerous weapon; and

"(4) refrain from any activity likely to be harmful to the safety of others.

"(g) In addition to the mandatory conditions set forth in subsection (f), the judicial officer may provide as a release condition that the person—

"(1) remain in the custody of a designated person who agrees to supervise him, if the designated person is able reasonably to assure the judge that the person will appear as required and will not pose a danger to the safety of another person or the community;

"(2) work conscientiously at his employment, or if unemployed, actively seek employment;

"(3) report on a regular basis to a designated law enforcement agency or pretrial service agency;

"(4) avoid all contact with potential witnesses who may testify concerning the offense;

"(5) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

"(6) execute an appearance bond in a specified amount and deposit in the registry of the court, in cash or other security as directed, a sum not to exceed 10 per centum of the amount of the bond, which deposit is to be returned upon the performance of the conditions of release;

"(7) execute a bail bond with solvent sureties, or deposit cash in lieu of such a bond; or

"(8) satisfy any other condition reasonably necessary to assure appearance as required and to assure the safety of any other person or the community, including a condition requiring that the person return to detention after specified hours or during specified periods, and abide by such other severe restrictions on freedom, associations, or activities that the court deems appropriate.

"(h) The judicial official shall order that a person—

"(1) who is charged with a dangerous or violent offense punishable by death or life imprisonment; or

"(2) who is charged with a dangerous or violent offense, and who has been convicted within the ten previous years of a dangerous or violent offense; or

"(3) who, having been charged with a dangerous or violent offense and released pending trial, is charged with having committed a dangerous or violent offense while on release; be held in detention unless the judicial officer finds upon clear and convincing evidence, (1) that he will appear as required and that his release will not pose a danger to the safety of any other person or the community, or (2) that specified conditions of release are sufficient to assure that he will appear as required and that his release will not pose a danger to the safety of any other person or to the community. A dangerous or violent offense under this subsection is an offense under State or Federal law, involving the sale, delivery, or trafficking of a controlled substance; or the use of a weapon; or threatened or actual physical harm to any other person.

"(i) At the petition of any person being held in detention, and upon finding that the conditional release of such person for a specific purpose or purposes will pose no danger to the safety of any other person or the community, the judicial officer may—

"(1) order the release of such person from time to time for not to exceed forty eight hours into the custody of a designated individual who agrees to supervise him, if such release is necessary to assist his attorney in preparation for trial;

"(2) order the release of such person during his working hours into the custody of a designated individual, if such release is necessary to the retention of his employement, and the judicial officer shall order the person to return to detention after the hours specified;

"(3) release such person for any other compelling purpose into the custody of the United States Marshall upon one or more release conditions.

"(j) A judicial officer ordering ~~the detention~~ of a person shall issue an order setting out the findings upon which detention is based. A judicial officer ordering the release of a person shall issue an order stating the conditions of release, shall advise him of the penalties applicable to a violation of a condition of release, and shall advise that a warrant for his arrest will be issued immediately upon such a violation. A failure to appear as required is not a bar or defense to a prosecution for bail jumping.

"(k) Any person ordered detained or concerning whom conditions of release are imposed, and who after twenty-four hours from the time of release hearing continues to be detained, may, upon application, have the order of detention or conditions of release reviewed by the judicial officer who issued the order or set the conditions. Unless the detention order or the conditions of release are amended, the judicial officer shall set forth in writing the reasons for continuing the detention or conditions imposed. If the judicial officer who ordered the detention or imposed conditions of release is not available, any other judicial officer in the district may review such order.

"(l) A judicial officer ordering the detention, or the release, of a person on a condition specified, may at any time, subject to the provisions of this section, amend his order to allow conditional release, or to impose additional or different conditions of release. If the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions, the provisions of subsection (k) are applicable.

"(m) A judicial officer may detain, for a period of ten days or less, a person charged with an offense who comes before him for a pretrial release determination if it appears that the person—

"(1) is, and at the time the offense was committed was, on pretrial or other release for a felony under State or Federal law; or

"(2) is on probation, parole, or other release pending completion of sentence for any offense under Federal, State or local law; and

"(3) that the person may flee or pose a danger to any other person or to the community if released.

During the ten-day period, the United States attorney shall notify the appropriate court, probation, or parole officer. If the official fails or declines to take the person into custody during such period, the person shall be treated in accordance with the provisions of subsections (a) through (i).

"(n) A court may dispose of an offense that is a misdemeanor by entering an order directing forfeiture of collateral posted to assure appearance if a fine in such an amount would be an appropriate sentence after conviction of the offense charged.

"(o) A person who has been released, and who has violated a condition of release, is subject to a revocation of release, and order of detention, and a prosecution for contempt of court. An attorney for the Government may initiate a proceeding in accordance with this subsection. The judicial officer shall enter an order of revocation and detention if, after a hearing the judicial officer—

"(1) finds that there is clear and convincing evidence that such person has violated a condition of his release; and

"(2) finds that—

"(A) based on the factors set forth in subsection (e) of section 3146, there is no condition or combination of conditions of release that will assure that such person will not flee or pose a danger to the safety of any other person or the community; or

"(B) no condition or combination of conditions will assure that the person will abide with reasonable conditions.

If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such appropriate conditions, he shall enter an appropriate order specifying the release conditions. In addition, the judicial officer may impose contempt sanctions if the person has violated a condition of his release.

"(p) Any information may be presented and considered in connection with an order entered pursuant to this section regardless of its admissibility under the rules governing admission of evidence in criminal trials.".

SEC. 2. Section 3147 of title 18, United States Code, is amended to read as follows:

**"§ 3147. Appeal from denial of release**

"(a) REVIEW.—A person—

"(1) who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued; and

"(2) whose application pursuant to subsections (k) and (l) of section 3146 has been reviewed by a judicial officer other than—

"(A) a judge of the court having original jurisdiction over the offense with which he is charged;

"(B) a judge in the United States Court of Appeals;

"(C) a justice of the Supreme Court of the United States; may file a motion for an amendment of the order with the court having original jurisdiction over the offense with which he is charged. Such a motion shall be determined promptly.

"(b) APPEAL.—In a case in which a person is detained after—

"(1) a court denies a motion under subsection (a) to amend an order; or

"(2) a detention order has been entered, or conditions of release have been imposed or amended, by a judge of the court having original jurisdiction over the offense charged;

an appeal may be taken to the court having appellate jurisdiction over such court. An order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146. Such an appeal shall be determined promptly.".

SEC. 3. Section 3147 of title 18, United States Code, is amended to read as follows:

**"§ 3148. Release pending sentence or appeal**

"(a) The judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom a term of imprisonment would not be an appropriate sentence, be held in official detention unless the judicial officer finds by clear and convincing evidence, after taking into account the nature and circumstances of the offense for which the person was convicted and the factors specified in subsection (e)(3) of section 3146, that the person is not likely to flee or pose a danger to the safety of any other person or the community. If the judicial officer finds that the person is not likely to flee or to pose a danger to the safety of any person or to the community, the person shall be treated in accordance with the applicable provisions of section 3146.

"(b) The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for writ of certiorari, be held in detention, unless the judicial officer finds—

"(1) by clear and convincing evidence, after taking into account the nature and circumstances of the offense for which the person was convicted and the factors specified in subsection (e) of section 3146, that the person is not likely to flee or pose a danger to the safety of any other person or the community; and

"(2) that the appeal is not frivolous or taken for purpose of delay.

If the judicial officer finds that the person is not likely to flee or pose a danger to the safety of any other person or the community, and that the appeal is not frivolous or taken for purposes of delay, the person shall be treated in accordance with the applicable provisions of section 3146.".

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97TH CONGRESS
1ST SESSION

# S. 1253

To tighten the conditions of release on bail for drug offenders.

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IN THE SENATE OF THE UNITED STATES

MAY 21 (legislative day, APRIL 27), 1981

Mr. CHILES (for himself, Mr. NUNN, and Mr. HOLLINGS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To tighten the conditions of release on bail for drug offenders.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That part D of title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841) is amended by adding at the end thereof the following new sections:

"RELEASE CONDITIONS

"SEC. 413. (a) In setting conditions of release under section 3146(a) of title 18, United States Code, for any person charged with an offense under section 401(a) of this title or section 1010(a) of title III with respect to a controlled substance in schedule I which is a narcotic drug or a controlled substance in schedule II, or charged under section 406 of this title with attempting or conspiring to commit an offense under section 401(a) of this title relating to an opiate, or charged under section 1013 of title III with attempting or conspiring to commit an offense under section 1010(a) of title III relating to a controlled substance in schedule I which is a narcotic drug or a controlled substance in schedule II, the judicial officer shall, in addition to determining which conditions will reasonably assure the appearance of such person for trial, consider which conditions will reasonably assure the safety of the community, the personal safety of persons in the community, including witnesses to the offense, and the prevention of similar offenses in the future by such person.

"(b) For purposes of this section and section 414, 'judicial officer' means any person or court authorized pursuant to section 3041 of title 18, United States Code, or the Federal Rules of Criminal Procedure, to admit to bail or otherwise to release a person before trial or sentencing or pending appeal, in a court of the United States and any judge of the Superior Court of the District of Columbia.

### "DENIAL OF RELEASE PRIOR TO TRIAL

"SEC. 414. (a) Notwithstanding the provisions of section 3146 of title 18, United States Code, a judicial officer shall deny release of a person charged with a violation of section 401(a) of this title or section 1010(a) of title III with respect to a controlled substance in schedule I which is a narcotic drug or a controlled substance in schedule II, or charged under section 406 of this title with attempting or conspiring to commit an offense under section 401(a) relating to a controlled substance in schedule I which is a narcotic drug or a controlled substance in schedule II, or charged under section 1013 of title III with attempting or conspiring to commit an offense under section 1010(a) of title III relating to a controlled substance in schedule I which is a narcotic drug or a controlled substance in schedule II, who—

"(1) has previously been convicted of an offense under any provision of Federal, State, or foreign law, relating to a controlled substance in schedule I which is a narcotic drug or a controlled substance in schedule II which is punishable by a term of imprisonment of more than one year;

"(2) at the time of the alleged violation, is on parole, probation, or other conditional release in connection with a conviction for a pending charge of an offense under Federal or State law that is punishable by a term of imprisonment of more than one year;

"(3) is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act;

"(4) was arrested while in possession of a passport or other document of identity and nationality which incorrectly identifies such person or belongs to some other person; or

"(5) has been convicted of having been a fugitive from justice, an escapee, or for willfully failing to appear before any court or judicial officer under Federal or State law.

"(b) No person described in subsection (a) of this section shall be denied release unless the judicial officer—

"(1) holds a hearing in accordance with the provisions of subsection (c) of this section;

"(2) finds that—

"(A) there is clear and convincing evidence that such person is a person described in paragraph (1), (2), (3), (4), or (5) of subsection (a) of this section; and

"(B) on the basis of information presented to the judicial officer, there is a substantial probability that the person committed the offense for which he is present before such judicial officer.

Notwithstanding the requirements of subsection (a) of this section, a judicial officer may grant release to such a person who has not been previously convicted of a felony under Federal, State, or foreign law relating to a controlled substance in schedule I or a controlled substance in schedule II if such judicial officer finds special mitigating factors for granting release and he records such factors in writing as part of the court proceedings.

"(c) The following procedures shall apply to any hearing held pursuant to this section:

"(1) Whenever the person seeking release is before the judicial officer, such hearing may be initiated on oral motion of the United States attorney.

"(2) Whenever the person has been released pursuant to section 3146 of title 18, United States Code, and it subsequently appears that such person may be subject to an order denying release under this section, the United States attorney may initiate a hearing by ex parte written motion. Upon such motion the judicial officer may issue a warrant for the arrest of the person.

"(3) The hearing shall be held immediately after such person is brought before the judicial officer for such hearing, unless such person or the United States attorney moves for a continuance. A continuance granted on motion of such person shall not exceed five calendar days, unless there are extenuating circumstances. A continuance or motion of the United States attorney shall be granted upon good cause shown and shall not exceed three calendar days. Such person may be detained pending the hearing.

"(4) Such person shall be entitled to representation by counsel and shall be entitled to present information, to testify, and to present witnesses in his own behalf.

"(5) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

"(6) Testimony of such person given during such hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but such testimony shall be admissible in proceedings under sections 3150 and 3151 of title 18, United States Code, in perjury proceedings, and for the purposes of impeachment in any subsequent proceedings.

"(7) Appeals from any order denying release may be taken pursuant to section 3147 of title 18, United States Code. The United States may appeal from any order granting release under this section.

"(d) The case of a person denied release pursuant to this section shall be placed on an expedited calendar and, consistent with the sound administration of justice, his trial shall be given priority.".

Sec. 2. The table of contents at the beginning of the Drug Abuse Prevention and Control Act of 1970 is amended by adding at the end of the listing for part D of title II the following:

"Sec. 413. Release conditions.
"Sec. 414. Denial of release prior to trial.".

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97TH CONGRESS
1ST SESSION

# S. 1554

To amend the Bail Reform Act of 1966 to permit consideration of danger to the community in setting pretrial release conditions, to eliminate surety bond, to permit pretrial detention of certain offenders, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JULY 31 (legislative day, JULY 8), 1981

Mr. THURMOND (for himself and Mr. HATCH, Mr. KENNEDY, Mr. BAUCUS, Mr. BUMPERS, Mr. DECONCINI, Mr. DENTON, Mr. LAXALT, and Mr. SPECTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To amend the Bail Reform Act of 1966 to permit consideration of danger to the community in setting pretrial release conditions, to eliminate surety bond, to permit pretrial detention of certain offenders, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Bail Reform Act of 1981".

SECTION 1. (a) Sections 3141 through 3151 of title 18, United States Code, are repealed and the following new sections are inserted in lieu thereof:

**"§ 3141. Release and detention authority generally**

"(a) PENDING TRIAL.—A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

"(b) PENDING SENTENCE OR APPEAL.—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

**"§ 3142. Release or detention of a defendant pending trial**

"(a) IN GENERAL.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

"(1) released on his personal recognizance pursuant to the provisions of subsection (b);

"(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

"(3) temporarily detained to permit revocation of conditional release pursuant to the provisions of subsection (d); or

"(4) detained pursuant to the provisions of subsection (e).

"(b) Release On Personal Recognizance.—The judicial officer shall order the pretrial release of the person on his personal recognizance, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

"(c) Release On Conditions.—If the judicial officer determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

"(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

"(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

"(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

"(B) maintain employment, or, if unemployed, actively seek employment;

"(C) maintain or commence an educational program;

"(D) abide by specified restrictions on his personal associations, place of abode, or travel;

"(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

"(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

"(G) comply with a specified curfew;

"(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(J) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

"(K) forfeit, upon failing to appear as required, such designated property belonging to the person as is reasonably necessary to assure his appearance;

"(L) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

"(M) satisfy any other condition, other than execution of a money bond, that is reasonably necessary to assure appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may at any time amend his order to impose additional or different conditions of release.

"(d) TEMPORARY DETENTION TO PERMIT REVOCATION OF CONDITIONAL RELEASE.—If the judicial officer determines that—

"(1) the person is, and was at the time the offense was committed, on—

"(A) release pending trial for a felony under Federal, State, or local law;

"(B) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

"(C) probation or parole for any offense under Federal, State, or local law; and

"(2) no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community;

he shall order the detention of the person, for a period of not more than ten days, and direct the attorney for the Government to notify the appropriate court, probation, or parole official. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section.

"(e) DETENTION.—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that:

"(1) no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community; and

"(2) on the basis of information presented by proffer or otherwise, there is a substantial probability that the person committed the offense for which he has been charged;

he shall order the detention of the person prior to trail.

"(f) DETENTION HEARING.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any other person and the community—

"(1) in a case that involves—

"(A) a crime of violence;

"(B) an offense for which the maximum sentence is life imprisonment or death; or

"(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

"(2) in any other case, upon motion of the attorney for the Government or upon the judge's own motion, that involves—

"(A) a serious risk that the person will flee;

"(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror; or

"(C) any felony committed after the person had been convicted of two or more prior offenses described in paragraph (1), or two or more State or local offenses that would have been offenses described in paragraph (1) if a circumstance giving rise to Federal jurisdiction had existed.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The person may be detained pending completion of the hearing.

"(g) FACTORS TO BE CONSIDERED.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

"(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

"(2) the weight of the evidence against the person;

"(3) the history and characteristics of the person, including—

"(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

"(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

"(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

"(h) CONTENTS OF RELEASE ORDER.—In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall—

"(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

"(2) advise the person of—

"(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

"(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

"(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court) and 1510 (relating to obstruction of criminal investigation).

"(i) CONTENTS OF DETENTION ORDER.—In a detention order issued pursuant to the provisions of subsection (e), the judge shall—

"(1) include written findings of fact and a written statement of the reasons for the detention;

"(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

"(3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and

"(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a

United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

### "§ 3143. Release or detention of a defendant pending sentence or appeal

"(a) RELEASE OR DETENTION PENDING SENTENCE.—The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142 (b) or (c). If the judicial officer makes such a finding, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

"(b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT.—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

"(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142 (b) or (c); and

"(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

"(c) RELEASE OR DETENTION PENDING APPEAL BY THE GOVERNMENT.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

**"§ 3144. Release or detention of a material witness**

"If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

**"§ 3145. Review and appeal of a release or detention order**

"(a) REVIEW OF A RELEASE ORDER.—If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

"(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

"(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

"(b) REVIEW OF A DETENTION ORDER.—If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

"(c) APPEAL FROM A RELEASE OR DETENTION ORDER.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

**"§ 3146. Penalty for failure to appear**

"(a) OFFENSE.—A person is guilty of an offense if, after having been released pursuant to this chapter—

"(1) he fails to appear before a court as required by the conditions of his release; or

"(2) he fails to surrender for service of sentence pursuant to a court order.

"(b) GRADING.—If the person was released—

"(1) in connection with a charge of felony or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction of an offense, he shall be fined not more than $5,000 and imprisoned for not more than five years;

"(2) in connection with a charge of misdemeanor, he shall be fined not more than $1,000 or the maximum provided for such misdemeanor, whichever is less, and imprisoned for not more than one year; or

"(3) for appearance as a material witness, he shall be fined no more than $1,000 or imprisoned for not more than one year or both.

A term of imprisonment imposed pursuant to this section shall be consecutive to the sentence of imprisonment for any other offense.

"(c) DECLARATION OF FORFEITURE.—If a person fails to appear before a court as required, and the person is subject to the release condition set forth in section 3142(c)(2)(K), the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.

**"§ 3147. Penalty for an offense committed while on release**

"A person convicted of a Federal, State, or local offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense for which he was on release, to—

"(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

"(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

**"§ 3148. Sanctions for violation of a release condition**

"(a) AVAILABLE SANCTIONS.—A person who has been released pursuant to the provisions of section 3142, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

"(b) REVOCATION OF RELEASE.—The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which his arrest was ordered for a proceeding in accordance with this section. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—

"(1) finds that there is clear and convincing evidence that the person has violated a condition of his release; and

"(2) finds that—

"(A) based on the factors set forth in section 3142(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

"(B) the person is unlikely to abide by any condition or combination of conditions of release.

If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, he shall treat the person in accordance with the provisions of section 3142 and may amend the conditions of release accordingly.

"(c) PROSECUTION FOR CONTEMPT.—The judge may commence a prosecution for contempt, pursuant to the provisions of section 401, if the person has violated a condition of his release.

**"§3149. Applicability to a case removed from a State court**

"The provisions of this chapter apply to a criminal case removed to a Federal court from a State court.".

(b) Section 3154 of title 18, United States Code, is amended—

(1) in subsection (1), by stiking out "and recommend appropriate release conditions for each such

person" and inserting in lieu thereof "and, where appropriate, include a recommendation as to whether each such person should be released or detained and, if release is recommended, recommend appropriate conditions of release"; and

(2) in subsection (2), by striking our "section 3146(e) or section 3147" and inserting in lieu thereof "section 3145";

(c) Section 3156(a) of title 18, United States Code, is amended—

(1) by striking out "3146" and inserting in lieu thereof "3141";

(2) in paragraph (1)—

(A) by striking out "bail or otherwise" and inserting in lieu thereof "detain or"; and

(B) by deleting "and" at the end thereof;

(3) in paragraph (2), by striking out the period at the end and inserting in lieu thereof "; and";

(4) by adding after paragraph (2) the following new paragraphs:

"(3) The term 'felony' means an offense punishable by a maximum term of imprisonment of more than one year; and

"(4) The term 'crime of violence' means—

"(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physicial force against the person or property of another; or

"(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physicial force against the person or property of another may be used in the course of committing the offense."; and

(5) in subsection (b)(1), by striking out "bail or otherwise" and inserting in lieu thereof "detain or".

(d) The item relating to chapter 207 in the analysis of part II of title 18, United States Code, is amended to read as follows:

"207 Release and detention pending judicial proceedings.............................. 3141".

(e)(1) The caption of chapter 207 is amended to read as follows:

**"CHAPTER 207—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS".**

(2) The section analysis for chapter 207 is amended by striking out the items relating to section 3141 through 3151 and inserting in lieu thereof the following:

**"3141. Release and detention authority generally.**
**"3142. Release or detention of a defendant pending trial.**
**"3143. Release or detention of a defendant pending sentence or appeal.**
**"3144. Release or detention of a material witness.**
**"3145. Review and appeal of a release or detention order.**
**"3146. Penalty for failure to appear.**

"3147. Penalty for an offense committed while on release.
"3148. Sanctions for violation of a release condition.
"3149. Applicability to a case removed from a State court.
"3150. Repealed.
"3151. Repealed.".

SEC. 2. Chapter 203 of title 18, United States Code, is amended as follows:

(a) The last sentence of section 3041 is amended by striking out "determining to hold the prisoner for trial" and inserting in lieu thereof "determining, pursuant to the provisions of section 3142 of this title, whether to detain or conditionally release the prisoner prior to trial".

(b) The second paragraph of section 3042 is amended by striking out "imprisoned or admitted to bail" and inserting in lieu thereof "detained or conditionally released pursuant to section 3142 of this title".

(c) Section 3043 is repealed.

(d) The following new section is added after section 3061:

### "§ 3062. General arrest authority for violation of release conditions

"A law enforcement officer, who is authorized to arrest for an offense committed in his presence, may arrest a person who is released pursuant to chapter 207 if the officer has reasonable grounds to believe that the person is violating, in his presence, a condition imposed on the person pursuant to section 3142(c)(2)(D), (c)(2)(E), (c)(2)(H), (c)(2)(I), or (c)(2)(L), or, if the violation involves a failure to remain in a specified institution as required, a condition imposed pursuant to section 3142(c)(2)(J).".

(e) The section analysis is amended—

(1) by amending the item relating to section 3043 to read as follows:

"3043. Repealed."; and

(2) by adding the following new item after the item relating to section 3061:

"3062. General arrest authority for violation of release conditions.".

SEC. 3. Section 3731 of title 18, United States Code, is amended by adding after the second paragraph the following new paragraph:

"An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the pretrial release of a person charged with an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.".

SEC. 4. The second paragraph of section 3772 of title 18, United States Code, is amended by striking out "bail" and inserting in lieu thereof "release pending appeal".

SEC. 5. Section 4282 of title 18, United States Code, is amended—

(a) by striking out "and not admitted to bail" and substituting "and detained pursuant to chapter 207"; and

(b) by striking out "and unable to make bail".

SEC. 6. Section 636 of title 28, United States Code, is amended by striking out "impose conditions of release under section 3146 of title 18" and inserting in lieu thereof "issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial".

SEC. 7. The Federal Rules of Criminal Procedure are amended as follows:

(a) Rule 5(c) is amended by striking out "shall admit the defendant to bail" and inserting in lieu thereof "shall detain or conditionally release the defendant".

(b) Rule 9(b)(1) is amended by striking out the last sentence.

(c) The second sentence of rule 15(a) is amended by striking out "committed for failure to give bail to appear to testify at a trial or hearing" and inserting in lieu thereof "detained pursuant to 18 U.S.C. § 3144".

(d) Rule 40(f) is amended to read as follows:

"(f) Release or Detention. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information or indictment issued, the Federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the Federal magistrate amends the release or detention decision or alters the conditions of release, he shall set forth the reasons for his action in writing.".

(e) Rule 46 is amended—

(1) in subsection (a), by striking out "3146, 3148, or 3149" and inserting in lieu thereof "3142 and 3144";

(2) in subdivision (c), by striking out "3148" and inserting in lieu thereof "3143";

(3) by deleting subdivision (d);

(4) by amending subdivision (e)(1) to read as follows:

"(1) DECLARATION.—If there is a breach of the condition set forth in 18 U.S.C. § 3142(c)(2)(K), the district court shall declare the property that is the subject of the condition to be forfeited to the United States.";

(5) by deleting the second and third sentences of subdivision (e)(3);

(6) by deleting "obligors" and "their" in the last sentence of subdivision (e)(3) and substituting "defendant" and "his", respectively;

(7) by amending subdivision (f) to read as follows:

"(f) EXONERATION.—If the forfeiture has been set aside or remitted, the court shall exonerate the defendant of the obligation to forfeit the property and shall release the property to him."; and

(8) by adding the following new subdivision at the end thereof:

"(h) FORFEITURE OF PROPERTY.—Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. § 3142(c)(2)(K) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.".

(f) Rule 54(b)(3) is amended by striking out "18 U.S.C. § 3043 and".

SEC. 8. Rule 9(c) of the Federal Rules of Appellate Procedure is amended by striking out "3148" and inserting in lieu thereof "3143".

○

Senator HATCH. I understand that Senator DeConcini will have an opening statement as soon as he arrives.

The subcommittee does not have need to introduce the first witness, other than to say that Senator Chiles is the leading sponsor of S. 1253 which tightens the conditions of release on bail for drug offenders.

Drug offenders have historically abused bail proceedings more than most criminal offenders. The lucrative nature of drug trafficking often provides them with ample resources to meet any bail condition.

I think, Senator Chiles, that you are addressing a very important aspect of the bail issue, and I commend you for that. We look forward to hearing your remarks.

As soon as you are through, I will introduce Senator Kassebaum.

## STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you, Mr. Chairman.

I am delighted to be here and to share this table with the distinguished Senator from Kansas.

I would like to thank you for giving me the opportunity to testify today. I want to commend you and the other members of the subcommittee for moving forward and holding these hearings on reforming Federal bail statutes.

Our bail and bond laws are certainly ready to be reviewed and reformed.

Each of us is aware of the dramatic increase in the rate of crime in recent years. My State of Florida has been particularly hard hit by this crime wave. The number of violent crimes in Florida increased by 27 percent last year. Murders were up by 28 percent; robberies jumped 54 percent.

Miami, I hate to say, has become the murder capital of the United States, with a rate of 70 murders per 100,000 persons. That is 50 percent greater than the murder rate in Detroit; over twice the murder rate in Los Angeles and Chicago; and nearly three times the murder rate in New York City.

This wave of crime has affected the very fiber of our communities. Forty percent of the people of Florida have said that they feel unsafe being out alone in their neighborhoods at night. In the Miami area, 24 percent of the people do not feel safe in their neighborhoods during the day.

Given a crime wave of these proportions, it is not surprising that the public has little confidence in the ability of our courts to deal with criminals. Seventy percent of the American public has little or no confidence in the ability of the courts to convict and sentence criminals.

At the root of this lack of confidence in our courts is the feeling that the balance in our criminal justice system has shifted. People feel that the courts give too much weight to the rights of criminals and pay little attention to the rights of the victim or the rights of society.

Some of the procedures now in effect in our courts give substance to that feeling. Certainly the bail bond system and the way it operates today does as much as any other criminal justice procedure to foster that lack of confidence in our courts.

The fundamental problem with today's bail system stems from the fact that the current law requires the judge, in making his bail decision, to take only one factor into consideration: Is the defendant likely to show up at further court proceedings?

The defendant's prior criminal record; the danger his release poses to individuals or to the community at large; the nature of the crime committed: none of these factors are considered in a bail determination.

It is, therefore, not surprising that the current bail system does, in fact, operate to put criminals back on the street to commit more crimes.

Mr. Chairman, you and other sponsors of S. 1554 cited studies that showed that the rearrest rate for persons who are out on bail is 16 percent nationwide. It has become clear that the current bail system puts criminals back on the street.

I strongly support changing the bail statutes to allow the judge to consider as a factor in determining release before trial, the danger created by releasing the defendant. To me that is a central feature of S. 1253, the bail reform bill that I introduced. I think it is a central feature of the bail reform bill that you have sponsored.

S. 1253 is designed to deal with a special problem, one that I am not sure is completely addressed in some of the other bail reform bills now before the Congress. I am referring to what has become a revolving door situation with our bail bond laws as they apply to persons arrested for drug trafficking.

My State of Florida has become the national port of entry for a massive invasion of illicit drugs. It is now estimated that 70 percent of the cocaine, 80 percent of the marihuana, and 90 percent of the illegal quaaludes that come into this country come through Florida. Revenues for illegal drug trafficking in Florida run from $7 to $10 billion a year. Individual revenues from drug transactions, according to Attorney General Smith, run from between $250,000 to $500,000 each month. That is in Florida.

With these large amounts of cash readily available, it is no surprise that no matter how high bail is set, the drug smuggler who has been arrested will make bail. Furthermore, it is not surprising that the drug dealer who gets out on bail will never appear in court.

Put yourself in the shoes of the drug dealer who has been arrested. He has two options. He can either stay in jail until trial, or he can post bail, forfeit the bond, and take the financial loss.

For the vast majority of drug dealers, the first option is simply unacceptable. A trial and a conviction add up to the prospect of a long prison term. The second option, on the other hand, translates into no more than a temporary business loss.

The situation today bears this out. There are presently 2,900 drug dealers who have jumped bail across the country and are presently at large. These fugitives outnumber our Federal drug agents by over 50 percent.

In Florida, the problem is especially serious. The U.S. marshal for the southern district of Florida currently has 369 failure to appear cases, of which 90 percent are drug related.

Let me cite two examples that underscore just how badly the current bail system is working.

Early this year, DEA's Operation Grouper, an undercover drug case, resulted in the arrest of 155 people and the immobilization of a multimillion-dollar smuggling ring. Jose Fernandez, one of the key defendants in Operation Grouper, had bail set originally at $21 million. He got that reduced to $5 million. He later got it reduced to $500,000. He paid the $500,000 bail, and now Mr. Fernandez is gone. He was the major target in Operation Grouper. That undercover operation went on for several years and it had DEA agents, Customs agents, and State and local law enforcement people involved. But the major target was able to get that bail reduced and skip.

Alfredo Gutierrez, a Bolivian who was arrested in connection with a $9 million downpayment in a cocaine deal that was valued at $200 million, posted $100,000 bail, was released. We have not heard of Mr. Gutierrez since that time.

Mr. Chairman, I believe that S. 1253 would go a long way toward closing that revolving door and would help assure that drug dealers who are arrested are brought to justice. The bill would establish special considerations for a bail release determination in cases where a person was arrested for a violation of Federal drug laws.

If there is substantial probability that the person arrested in fact committed the drug offense, the court would look at a series of factors. If the Government could establish by clear and convincing evidence that the person arrested falls into one of five categories, then the presumption shifts. The person arrested would be held pending trial unless he could present special mitigating factors to justify being released on bail.

Those factors that the judge must consider are:

One, does the person arrested have a previous narcotics conviction?

Two, is the person arrested on parole or probation for a felony narcotics offense?

Three, is the person arrested an illegal alien?

Four, is the person arrested in possession of a false passport?

Five, is the personer a fugitive from justice?

If one of those factors was there, the presumption would shift. The presumption would then be that he should not be given bail unless he could show mitigating factors where he should.

S. 1253 gives the defendant at the bail release hearing procedural protections along the lines of the ones that are provided in the bill you have cointroduced. The bail hearing must be held immediately, and the defendant has the right to counsel and cross-examination and to present witnesses. It also provides for expedited appeals of any order pending trial. Trial for anyone who is not released would have to be held as soon as possible.

These protections for the defendant are, I believe, consistent with the ones that are provided in the similar legislation.

In any case, it would certainly be my intention to make sure that any person covered by S. 1253 be afforded his due process protections.

Mr. Chairman, I feel that we need to address the specific problems that arise in connection with release before trial for drug dealers.

While I support adding the language "danger release poses to the community," which is a factor of language in the bill you are cointroducing, I am not sure it would solve the special problem of drug dealers.

Often a person who has been arrested for drug dealing may not be dangerous in the sense that he is likely to rob or kill someone. He may be the money man in a drug ring. However, he might also be the most important person in that ring because he is the money man.

The other factor is: Is he likely to appear at trial. That has been shown to be very ineffective when we are dealing with drug cases because of the tremendous sums of money involved. It is so easy for these people to post even a high bail, and then skip and never come back.

The opportunity for the enormous profits is readily available. The drug dealer who has been arrested would rather take the business loss than go to trial.

I understand that S. 1554 provides for temporary detention pending release. It provides for detention when the judge concludes that there is no combination of conditions that will assure the defendant's appearance.

I would suggest that at a minimum some of the factors in S. 1253 should be included as conditions which will not assure appearance at trial, so that the judges have more direction in making a determination as to whether or not they should release a drug dealer pending trial.

In fact, I would prefer moving further. Your bill provides that bail determinations for persons who have already been convicted start with a presumption that the defendant should be detained. I believe that when major drug traffickers are involved, the same presumption that the person should be detained ought to apply. Drug traffickers have little problem getting around in today's bail system. Without this presumption, I am afraid they will be able to get around the bail system that would be set out in S. 1554.

Mr. Chairman, in closing, I want to thank you and the other members of the committee for coming to grips with this important problem. I can understand the committee's desire to take a general approach in order to bail reform. My concern is that when we are talking about major drug traffickers, we are talking about a very special situation. I believe that we need some specially crafted legislation to handle that situation and ensure that those who are responsible for the drug problem which has swept this country are brought to justice.

I would like to submit for the record a copy of the resolution of support for S. 1253 which was recently endorsed by the National Association of Attorneys General.

Senator HATCH. Without objection, your entire statement will be included in the record at the completion of your oral testimony.

Senator CHILES. Thank you.

Senator HATCH. Your bill specifically amends the Comprehensive Drug Abuse Act to allow the court to consider, in your words, the "safety of the community, the personal safety of persons in the community, including witnesses to the offense, and the prevention of similar offenses in the future by such persons."

Do you feel that the considerations which prompted you to introduce this bill extend to other violent and serious crimes in the Federal criminal code as well?

Senator CHILES. I am sure that there are abuses there, too. I think that the drug cases are special situation, because of the tremendous amounts of money involved.

We have people who you and I would consider street hoodlums walking around in Miami carrying $1 million in cash in a briefcase. And they are not even the top figures. These are people who are midlevel figures.

That is the kind of money that is involved in this situation. Because of that and because of the cases that we are now seeing, we've learned that the major offenders we catch will shop around until they get a reduced bail. For them, $500,000 is just the cost of doing business. That is not too much money. Even several million will not be.

There needs to be some kind of special situation crafted for that.

Senator HATCH. A special problem in the drug-related offenses is that the offender often can put up bail with the fruits of his illegal or criminal activities.

Yet many courts feel that requiring the suspect to document the source of his bail money may be a very difficult or enormous administrative burden. Can we avoid this burden in any way?

Senator CHILES. If they could not document where the money is coming from, you would not have to give them bail.

Senator HATCH. That is right.

Senator CHILES. You are putting the burden on them to show where it comes from. I am for putting any burden on them that I can.

Senator HATCH. I think I have gotten that picture. That is good.

Thank you, Senator Chiles, for your testimony.

Senator CHILES. Thank you.

[The resolution supporting S. 1253 and H.R. 3883 and additional material subsequently submitted follow:]

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
ANNUAL MEETING
June 24-27, 1981
Jackson Hole, Wyoming

## RESOLUTION

## BAIL REFORM

WHEREAS, most federal, state, and local decisions regarding bail are based solely on the likelihood that the defendant will return to court for his next scheduled appearance; and

WHEREAS, the rate of recidivism for individuals released on bail for serious crimes is extremely high; and

WHEREAS, citizens have the right to expect that their safety will be a factor considered prior to the time that bail is granted for a defendant accused of a violent crime;

NOW, THEREFORE, BE IT RESOLVED that the National Association of Attorneys General recommends that the United States Congress institute changes in federal bail practices to require that judges consider the danger that the offender poses to society in addition to other factors; and

BE IT FURTHER RESOLVED by the National Association of Attorneys General that:

1. the Association supports S. 1253 and H.R. 3883, relating to denial of bail for narcotics offenders, as an example of the proper reform of bail procedures in the area of narcotics abuse and control; and
2. the General Counsel of this Association is authorized to make these views know to the Congress, the Administration, and other appropriate individuals.

LAWTON CHILES
FLORIDA

United States Senate

COMMITTEES:
APPROPRIATIONS
BUDGET
GOVERNMENTAL AFFAIRS
SPECIAL COMMITTEE ON AGING
DEMOCRATIC STEERING COMMITTEE

October 20, 1981

The Honorable Orrin G. Hatch
Chairman
Senate Subcommittee on the Constitution
108 Russell Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

I wanted to take this chance to thank you again for giving me the opportunity to testify at your Subcommittee's hearings on bail reform. As I stated at the hearings, I stand ready to work with the Committee in any way I can to help move bail reform proposals forward.

I recently received a report from the Administrative Office of the United States Courts which focused on the problem of pretrial release in narcotics prosecutions in the U.S. Courts for the Southern District of Florida. The report was prepared for Congress William Hughes, the Chairman of the House Judiciary Subcommittee on Crime. Its findings underscore the special problems involved in bail determinations for persons charged with drug trafficking offenses. Over 50 percent of the defendants in the Southern District of Florida are drug offenders. Of those who were released on bail pending trial, 17.6 percent failed to appear; the average amount of bail set for those who failed to appear was $75,800.

My bail reform proposal (S. 1253) would help close this revolving door situation by denying bail to drug dealers in many instances. I would hope that this report would assist you and the other members of the Subcommittee in addressing the special problem of bail for drug violators.

I would like to request that you add this study to the Committee's hearing record, as an appendix to my statement. If I can be of any further assistance, please feel free to contact me or Brian Walsh of my staff.

With kind regards, I am

Sincerely,

Lawton

LAWTON CHILES

LC/xvs

NINETY-SEVENTH CONGRESS
PETER W. RODINO, JR. (N.J.), CHAIRMAN

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BILL MC COLLUM, FLA.

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

GENERAL COUNSEL:
ALAN A. PARKER
STAFF DIRECTOR:
GARNER J. CLINE
ASSOCIATE COUNSEL:
FRANKLIN G. POLK

October 14, 1981

The Honorable Lawton Chiles
437 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Chiles:

Last spring, the Subcommittee on Crime held hearings in Florida on the crime problem in the Miami area. That hearing made clear to me that part of the problem related to the enormous number of narcotics prosecutions, and the very high rate of defendants who fail to appear for court appearances. As a result, I requested the Administrative Office of the United States Courts to conduct an in-depth study of the entire pretrial release situation in the Federal Courts in the Southern District of Florida. I have now received the final report of the Administrative Office and am enclosing a copy for your review. I hope this material will be of use to you.

If you have any questions about the report or the hearing in Miami, please don't hesitate to contact either me or a member of the staff of the Subcommittee on Crime at 225-1695.

Sincerely,

Bill

William J. Hughes
Chairman
Subcommittee on Crime

WJH:vsh
Enclosure

## SUMMARY OF FINDINGS

Failure to appear and defendants charged with drug offenses in the Southern District of Florida.

## PREPARED BY THE PRETRIAL SERVICES BRANCH

The Pretrial Services Branch, in response to a request made by Congressman William J. Hughes, Chairman of the House Subcommittee on Crime, conducted a study which examined the nature of the fugitive and failure to appear problem regarding defendants charged with drug offenses in the Southern District of Florida.

The major findings of that study reveals that even though "drug defendants" in the Southern District of Florida have financial conditions of release set more often and at much higher amounts than in the 10 PSA districts they fail to appear eight (8) times as often as those in the demonstration districts.

The reasons for this cannot be stated with any certainty, however, it is worth noting that defendants who were charged with drug offenses and failed to appear had extremely poor roots in the community in which they were arrested.

1. While the number of criminal filings in the federal courts declined approximately 10% from July 1, 1978 through June 30, 1980, the number of cases increased by 10% in FL/S.

2. During the same time period the number of defendants prosecuted in the federal courts declined 10% but the number increased 15% in FL/S.

3. For the same time period overall federal drug prosecutions declined while they increased 30% in FL/S.

4. Less than one in five of all defendants prosecuted nationally were charged with drug offenses while almost one half the defendants in FL/S were so charged.

5. For the time period July 1, 1978-June 30, 1980 the failure to appear rate in FL/S was 12.9%. In the 10 PSA districts it was 2.3%.

6. The failure to appear rate for "drug defendants" was 17% in FL/S. During the same period it was 2% in the PSA districts.

7. Ninety-two percent (92%) of all defendants in FL/S were released prior to trial. In the 10 PSA districts the rate was 88%.

8. Eighty-five percent of the defendants who were charged with drug offenses and failed to appear in the FL/S had lived in the district for less than one month at the time they were charged. This rate was only 10% in the 10 PSA districts.

9. U.S. citizens made up 45.4% of the defendants prosecuted in FL/S. In the 10 PSA districts they accounted for 92% of the total.

10. The overall failure to appear rates in the FL/S were much higher than in the 10 PSA districts despite the fact that money bail was set more often in FL/S (50% to 31%).

11. The failure to appear rate was approximately eight times greater for "drug defendants" in the FL/S than the PSA districts even though bail was set above $20,000 more than twice as often (63%-29%) for those defendants in FL/S than in the PSA districts.

12. The average amount of bail set for "drug defendants" who failed to appear was $75,800.

## REPORT ON THE INCIDENCE OF FAILURE TO APPEAR BY DEFENDANTS CHARGED WITH DRUG CRIMES IN THE SOUTHERN DISTRICT OF FLORIDA

This report was prepared by the Pretrial Services Branch of the Administrative Office of the United States Courts at the request of Congressman William J. Hughes, Chairman of the Subcommittee on Crime of the House Committee on the Judiciary. In a letter written March 17, 1981, to Mr. William E. Foley, Director of the Administrative Office of the United States Courts, Congressman Hughes asked that a study be conducted which would examine the nature of the fugitive and failure to appear problem regarding defendants charged with drug offenses in the Southern District of Florida. It was specifically requested that the analysis include:

> An identification of the defendants who fail to appear for trial after having met release conditions established at a bail hearing and those who are classified as fugitives by other criteria (such as by being the subjects of unexecuted arrest warrants, being sought by law enforcement, etc.) The study should analyze the fugitive problem by offense, conditions of release, previous conviction and arrest records of defendants, stage of the proceedings at which flight occurs, nationality status and ties to the community, and by other relevant factors. It should, of course, compare flight cases with nonflight ones, for any knowledge that may be contained in this information concerning the setting of appropriate and successful release conditions. Cases in which the release conditions were not met and the defendants remained in pretrial detention should be similarly examined.

To assist in this study the Pretrial Services Branch selected pretrial services officers with extensive experience in collecting and coding bail data. The team was supervised and assisted by the pretrial services specialist who has had primary responsibility for compiling similar information provided to Congress on the 10 Pretrial Services demonstration districts. These districts are: Southern New York, Eastern New York, Eastern Pennsylvania, Maryland, Northern Illinois, Eastern Michigan, Western Missouri, Northern Georgia, Northern Texas, and Central California. The officers' experience enhances the accuracy of the data and the reliability of the findings in this report.

The report consists of four major sections. The first is a description of the general demographic data that was collected in the district; the second examines the characteristics of defendants charged with drug offenses; the third deals with those defendants who were charged with drug offenses and failed to appear; the final section analyzes the characteristics of drug defendants who were detained until the disposition of their cases. All available information on each defendant prosecuted in statistical year 1979 (the 12-month period ending June 30, 1979) and statistical year 1980 (the 12-month period ending June 30, 1980) was collected. Cases involving Rule 20 transfers to or from other districts for prosecution as well as cases in which defendants were secured for prosecution by writs of habeus corpus were excluded from the study. All cases which were not "closed" were also excluded. (A closed case is defined as one in which a final sentence or judicial verdict was rendered or one in which the defendant failed to appear and a bench warrant was issued.) This report is based on the 1,473 defendant cases that met these criteria and where significant, comparisons are made with statistics generated by the ten Pretrial Services demonstration districts and the annual report of the Director.

## I. GENERAL STATISTICS ON ALL DEFENDANTS

An examination of some of the general statistics regarding the Southern District of Florida reveals the following:

Table 1.

| | 1-Year Period Ending June 30, 1979 | | | 1-Year Period Ending June 30, 1980 | | |
|---|---|---|---|---|---|---|
| | cases filed | defendants prosecuted | average defendant /case | cases filed | defendants prosecuted | average defendant /case |
| FL/S | 548 | 1,057 | 1.93 | 602 | 1,216 | 2.02 |
| Nationally | 31,536 | 42,245 | 1.34 | 27,968 | 38,033 | 1.36 |

The above table reveals that for the last 2 completed statistical years, while the number of cases filed and the number of defendants prosecuted nationally have declined by about 10%, the number of cases filed in the Southern District of Florida increased by 10% and the number of defendants prosecuted in that district has increased 15%.

In addition, the number of defendants per case is higher in the Southern District of Florida than in the national average. A possible explanation for this disparity in trends between the Southern District of Florida and the national average may be seen in the table below.

Table 2.

| | 1-Year Period Ending June 30, 1979 | | | 1-Year Period Ending June 30, 1980 | | |
|---|---|---|---|---|---|---|
| | drug cases filed | defendants prosecuted for drug offenses | average defendants per drug case | drug cases filed | defendants prosecuted for drug offenses | average defendants per drug case |
| FL/S | 182 | 572 | 3.14 | 241 | 573 | 2.46 |
| Nationally | 3,277 | 7,208 | 2.20 | 3,130 | 6,678 | 2.13 |

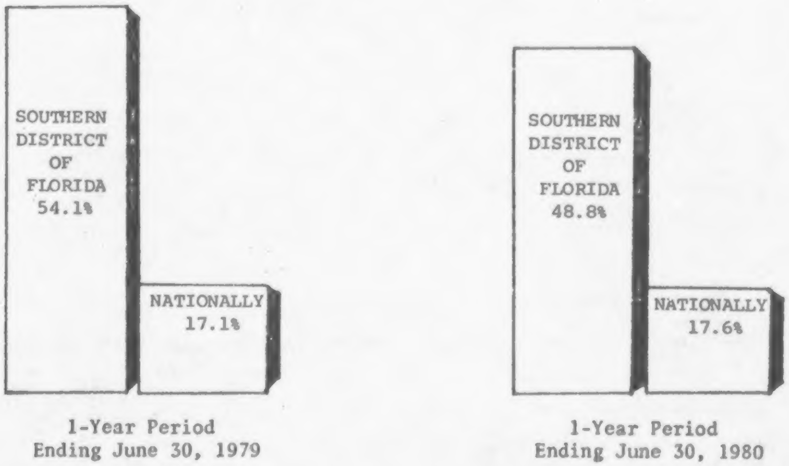
The national statistics reveal a decline in drug prosecutions from 1979 to 1980, while the Southern District of Florida's drug cases increased over 30% during that same time period.

The average number of defendants per drug case in the Southern District of Florida remains consistently higher than the national average. Since the nondrug cases in the SD/FL have remained relatively stable from 1979 to 1980, the increase in the work of the courts appears to be directly attributable to the increase in narcotics cases filed in that district.

Most drug prosecutions in the Federal courts are fairly evenly distributed among the identified activities of possession and sale with the activities of importing, manufacturing, and improper dispensing occurring less frequently. In the Southern District of Florida the activities most often identified in indictments are sales and importation.

Graph 1.

Percent of all defendants prosecuted who were charged with drug offenses.



Fewer than 1 in 5 of all defendants prosecuted nationally are charged with drug offenses, while approximately every other defendant brought before the court in the Southern District of Florida is charged with a drug offense.

## A. Defendant Characteristics

As explained in the introduction, 1,473 closed defendant cases from the Southern District of Florida were examined.

The following table identifies the status of those 1,473 defendants in the survey as of July 15, 1981:

Table 3.

| No FTA | Never Arraigned -Fugitive | Made Bail, FTA Before Trial -Fugitive | Made Bail, Convicted FTA Before Sentence -Fugitive | Made Bail, Convicted Sentenced Appealed FTA -Fugitive | Made Bail FTA Apprehended & Sentenced | Never Released |
|---|---|---|---|---|---|---|
| 1,158 | 39 | 102 | 6 | 6 | 57 | 105 |
| 78.6% | 2.6% | 6.9% | 0.4% | 0.4% | 3.9% | 7.1% |

One hundred and fifty-three (73%) of the 210 defendants who fled from prosecution at any stage of the process are still at large.

Of the 1,473 closed defendant cases, 39 (2.6% of the total cases) defendants were never arrested or summoned to appear (law enforcement simply could not locate these defendants to arrest them - they remain fugitives to date) and thus, never entered the court system beyond being named in an indictment. Since bail was never set on these defendants, they will be excluded in any discussion concerning bail violations or bail rates.

One hundred and five (7.1%) defendants were arrested, appeared at an initial bail hearing, and subsequently were never able to meet their bail requirements (usually money bail). As they were never released on bail, they will also be excluded in any discussion concerning bail violations or bail rates.

Percentages in this portion of the report are based on the actual number of defendants on which data was available for that specific characteristic. Data was not available for all characteristics in the Southern District on all defendants. Subsequent descriptions comparing the Southern District of Florida with the 10 Pretrial Services Agency districts reflect the extent data was not available for each category and the percentages in those tables are based on total number of defendants in the study.

Citizenship - U. S. citizens made up 49.4% of the defendants prosecuted the Southern District of Florida during the time period covered by the study. In the 10 Pretrial Services Agency districts, U.S. citizens accounted for 92.2% of the defendants. Legal aliens accounted for 15.7% of the defendant population, and illegal aliens another 8.7%. The research team was unable to precisely identify the citizenship of 26.2% of those prosecuted, though in considering all surrounding factors, an educated guess is that most were "illegals" from Central and South America.

Ethnicity - The largest ethnic groups represented were white, 43.8%; Hispanic (South and Central American), 33.1%; and Hispanic (Cuban), 12.9%. The ethnicity of the remaining 10.2% was unknown.

Time in District - The statistics in this category provide insight to the problems of crime and failure to appear in the district. Forty-seven percent (47%) of all the defendants in the study had resided in the district less than one month at the time they were being prosecuted. This compares to a percentage of only 7.4% in the 10 pilot Pretrial Services districts.

Employment - Sixty-four percent (64%) of defendants were employed. This percentage in the 10 Pretrial Services Agency districts is only 50%. The differences here can be attributed to the large number of high volume drug dealers in the Southern District of Florida and their claims of self-employment in enterprises which are no more than "fronts" for their illegal activities.

Marital Status - Forty-one percent (41%) of all the defendants were married, 26% were single, and the remainder were divided among the subcategories of separated, divorced, widowed, and unknown.

Opiate Addiction - Only 1.3% of all the defendants admitted to or were determined to be addicted to opiates. This figure, on its face, seems unusually low, especially when you consider that drug cases occur 2½ times more frequently in this district than nationally, and that opiate addiction in the 10 Pretrial Services Agency districts exceeds 5%. However, the percentages are not surprising when considering that (1) arrests involving opiates account for only 5% of the defendants in the Southern District of Florida drug cases and, that (2) addicts are not reliable couriers or business associates in such large scale drug operations.

Criminal History - Twenty-seven percent (27%) of the defendants had previous adult convictions, 13.5% had been committed to adult criminal institutions, 12.1% had a pending offense at the time of their arrest, and 0.9% were on parole.

### B. Defendants and the Court Process

An overwhelming percentage of cases in the district are processed in Miami (75%). Drug cases were the type most frequently filed in the district. The 747 defendants charged in that category make up 50.7% of the total. Defendants charged with fraud and embezzlement violations were the second largest group (13.8%) followed by immigration cases (11.5%).

#### Bail and Detention

Bail was set for 1,444 defendants and 1,329 were released at some point of the proceedings for an overall release rate of 92.3%.

It is worth noting that the release rate in the 10 Pretrial Services districts was 88% during the same time period. In the Southern District of Florida 952 of the 1,329 released defendants (71%) were able to meet the conditions of bail at their initial appearance and 672 of the 1,329 (50%) were held in pretrial custody for less than one day. The initial release rate in the 10 Pretrial Services Agency districts was 76%.

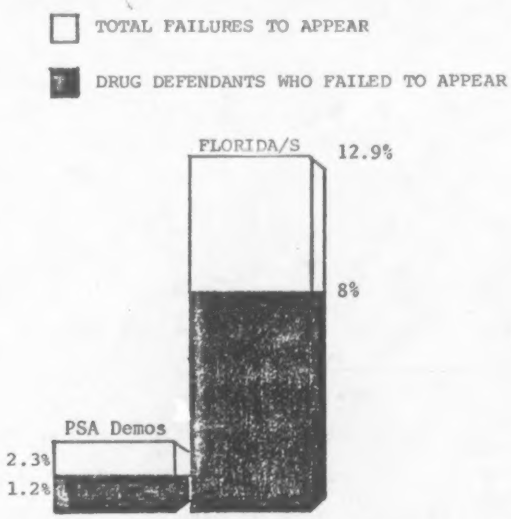
Conditions of release in which a defendant had to post cash or collateral or utilize compensated surities were set in 50% of the cases. During the same period such conditions were set only 31% of the time in the 10 Pretrial Services Agency districts.

Failure to Appear

The failure to appear rate for defendants who had bond set at a court appearance and were released was 12.9%. During the same time period the 10 Pretrial Services districts experienced failure to appear rates of 2.3% (less than 1/5 of the rate in the Southern District of Florida).

Graph 2.

Failures To Appear as a Percent
of All Cases Prosecuted in Miami
For the 2-Year Period (July 1, 1978 - June 30, 1980)



Case Disposition

There were 39 (2.6% of total cases) defendants who were never arrested and are still fugitives. Of the 1,329 defendants who were released, 102 (7.6%) failed to appear after bond was set at a court hearing and are still at large. Excluding the 39 defendants who were never arrested, 1,026 (71.5%) of the remaining 1,434 defendants were convicted, 220 (15.3%) had their cases dismissed, 76 (5.3%) were acquitted, and 8 (.55%) died during the pretrial process. Six hundred and seventy-five (675) or 66% of those convicted received custodial sentences of some type.

## II. DEFENDANTS CHARGED WITH DRUG OFFENSES

Defendants charged with drug offenses were reviewed in a manner similar to the preceding general defendant population. As previously stated, court records revealed that 747 (50.7%) of the total number of defendants (1,473) in the 2-year period were charged with drug offenses.

Table 4.

Types of drugs and Activities

| | Import | Sell | Possess | Totals |
|---|---|---|---|---|
| Marijuana | 160 | 73 | 35 | 268 |
| Heroin | 4 | 27 | 5 | 36 |
| Cocaine | 89 | 199 | 75 | 363 |
| Qualuude | 4 | 63 | 7 | 74 |
| All Others | 0 | 6 | 0 | 6 |
| Totals | 257 | 368 | 122 | 747 |

Table 4 indicates the type of illegal activity charged and the specific type of drug involvement. These indicators were taken directly from indictments filed in each case. The largest number of defendants were charged with selling cocaine (199 or 27%). However, during the investigation, it became obvious that the activity of primary concern in this district is importation due to the large quantities of drugs involved. Wholesale value of all drugs seized during the period studied was over one-half billion dollars.

### A. Defendant Characteristics

Citizenship - U.S. citizens made up 45.8% of those defendants charged with drug offenses. Legal aliens accounted for 21.4%, illegal aliens 6.6%, and 20.7% were of undetermined citizenship. In the 10 demonstration districts 87% of those defendants prosecuted for drug offenses are U.S. citizens.

Ethnicity - The largest ethnic group represented was Hispanic, with Cubans (18.2%) and South and Central Americans (34%) accounting for a total of 52.2% of all drug defendants. Whites made up the second largest group (42.8%).

Time in District - Almost one half (48%) of the defendants charged with drug offenses had lived less than 1 month in the district at the time the offense for which they were prosecuted was committed.

In the 10 Pretrial Services Agency districts defendants in that category made up only 11.8% of the total during the same time period.

Employment - Court records indicated that 51% of the drug defendants were employed, with another 17.8% of unidentified status. In the Pretrial Services Agency districts, 61% of the drug offenders were employed.

Marital Status - Married defendants made up 38.7% of the drug offender category. Twenty-four percent were single and 20.4% were divorced or separated.

Opiate Addiction - Only 1% of these defendants claimed or were found to be addicted to opiates at the time of their arrest, while in the Pretrial Services Agency districts, almost 5% were addicted.

Criminal History - Slightly more than 27% of these defendants had previous adult convictions (45% in PSA) and 11% had some type of adult criminal commitment (20% in PSA). Only 1.4% were on probation or parole at the time of their arrest.

## B. Defendants and the Court Process

Bail and Detention - After removing the 17 defendants who were never arrested from the total of 747, the overall release rate for drug offenders is 92% (669 released out of 730) release rate in PSA districts is 88%). Sixty-one percent of these defendants made the bail that was set at their initial appearance. The rate at which money bail (financial conditions of release) was set was 65%. During the same period of time the 10 Pretrial Services Agency districts set money bond for 54% of the drug defendants.

When financial conditions of release were set in Florida, the bond amount for drug defendants was in the $20,000 to $50,000 range in 44% of the cases and above $50,000 another 19% of the time. In the Pretrial Services Agency districts it was in the former range for 19% of the defendants and the latter 10.5% of the time. Thus, money bail was set in drug cases in amounts greater than $20,000 more than twice as often in the Southern District of Florida than in the 10 Pretrial Services Agency districts (63% - 29.5%).

### Failure to Appear

A total of 118 (17.6%) of 669 defendants failed to appear after bail was set and they were released. In addition, 17 defendants were never arrested and remain fugitives.

The table below depicts the release and fugitive status of all 747 defendants charged with drug offenses.

Table 5.

| No FTA | Never Arrested -Fugitive | Made Bail, FTA Before Trial -Fugitive | Made Bail, Convicted FTA Before Sentence -Fugitive | Made Bail, Convicted Sentenced Appealed FTA -Fugitive | Made Bail FTA Apprehended & Sentenced | Never Released |
|---|---|---|---|---|---|---|
| 551 | 17 | 78 | 4 | 4 | 32 | 61 |
| 73.8% | 2.3% | 10.4% | 0.5% | 0.5% | 4.3% | 8.2% |

Case Disposition - Seventeen (2%) of the drug defendants were never arrested and are still fugitives and another 78 (11%) remain fugitives after being released on bail. Of the remaining 652 defendants, 522 (80%) were convicted, 80 (12%) had their cases dismissed, 49 (7.5%) were acquitted, and 3 (.05%) died prior to trial.

The average length of sentence was 44 months. The average custody sentence in the 10 demonstration districts for the same time period is 33 months. Of the 522 who were convicted, a custodial sentence was given to 449 (85%) defendants.

## III. DEFENDANTS CHARGED WITH DRUG OFFENSES WHO FAILED TO APPEAR

here were 135 defendants charged with drug offenses in the Southern District of Florida who became fugitives. The particular point in the court proceedings at which these defendants became fugitives is isolated in columns 2 through 6 of table 5 (preceding page).

### A. Defendant Characteristics

Citizenship - Only 23 (17%) of the defendants in this category were American citizens, 4 (2.9%) were illegal aliens, and 100 (74%) were of undetermined citizenship.

Ethnicity - Seventy-five percent of the defendants in this group were Hispanic. The remaining 25% were white.

Time in District - Over 85% of the narcotics defendants who failed to appear had been in the district for less than one month. Defendants in the same category in the 10 Pretrial Services Agency districts had been in the district less than 1 month in only 10.4% of the cases.

Employment - Employment information was available for only 54% of these defendants. Fourteen point eight percent of the defendants were employed and the remaining 31% were unemployed. Store front "businesses" and unverified claims of self-employment were believed to be untrue claims by defendants to explain large amounts of money derived from drug transactions.

Marital Status - Data on marital status for defendants in this category was too incomplete to utilize.

Opiate Addiction - The researchers were unable to identify any opiate users or addicts among defendants in this category.

Criminal History - Sixteen percent (16%) of those in this category had previous convictions, 11% had previous adult criminal commitments, 2% were on probation or parole at the time of the new charges, and 5% had other charges pending. In the 10 demonstration districts 54% had prior records, 50% had adult convictions, 37.5% had previous adult commitments, and 27.1% had other pending offenses.

B. Defendants and the Court Process

As 17 of the above discussed 135 defendants never entered the court process other than being named in an indictment and having a warrant issued for their arrest, they will be excluded from the remainder of the analysis. They were never arrested, bond was never set and, thus, by definition, are not true bond jumpers (FTA's).

Bail and Detention - Of the 117 drug defendants who jumped bond, 63 (54%) were not detained at any point of the pretrial process. Of those released, 73 (62%) of the fugitives posted money bond and the remaining 45 (38%) were released on nonfinancial terms. Bail was set above $20,000 for 65% of the defendants who posted bond. The average amount of bond set for these defendants who failed to appear was $75,800. It was set above $20,000 twenty percent of the time in the 10 Pretrial Services Agency districts.

Failure to Appear - Of the 117 drug defendants who failed to appear, 85 (73%) are still at large. The remaining 32 defendants have been apprehended and their cases concluded, as discussed below.

Case Disposition - A total of 32 individuals who were placed on bond became fugitives but were apprehended and returned to court for disposition. The average amount of bond set for these defendants was $57,100. Upon their return to court, 14 (44%) were convicted, 1 died, 3 were acquitted, and the remaining 14 defendants were dismissed. Of those 14 convicted, all but one was sentenced to the custody of the Attorney General. Two received less than 18 months and the remaining 12 were sentenced for varying terms of from 3 to 9 years. The average length of custody time given was 66 months.

By comparison, 77.5% (1026/1324) of all offenders studied in this 2-year analysis (drug and nondrug) were convicted and sentenced, and of those sentenced, 64.8% (665/1026) were sentenced to the custody of the Attorney General. Of drug offenders, 80.5% (522/648) were convicted and sentenced and of those sentenced, 85% (446/522) were sentenced to the custody of the Attorney General. The average prison term for nondrug offenders was 22 months while the average prison term for drug offenders was 44 months.

## IV. DEFENDANTS WHO WERE DETAINED UNTIL CASE DISPOSITION

There were 105 defendants who, once arrested, were never released until there was a final disposition of their case. This amounts to 7.1% of the total 1,473 defendants.

### A. Defendant Characteristicts

Citizenship - Illegal aliens made up 53% of the defendants that were never released pending case disposition, legal aliens 22.9%, and U.S. citizens 13.3%. The remainder were of unknown citizenship.

Ethnicity - The largest ethnic group represented in this category were Hispanics (66%) with whites second (21.9%), and blacks third (13.3%).

Time in the District - Seventy-six percent (76%) of these defendants had been in the community less than 1 month at the time they were arrested.

Employment - Records indicated that 42% of these defendants were unemployed and that 44% were employed. There were no data available regarding the employment status of the other 14%.

Marital Status - Single defendants made up the largest group in this category (43%), with married defendants second (37%), and those divorced third (6.5%).

Opiate Addiction - Eleven percent (11%) of the defendants in this category were identified as opiate abusers.

Criminal History - Defendants with prior adult convictions constituted 18.1% of this category. Those with previous custodial commitments equaled 11.4%. Thirteen percent (13%) of these defendants had pending offenses at the time of the federal arrest.

### B. Defendants and Court Process

Bail and Detention - Sixty-one percent (61%) of the defendants who were detained until disposition had bails in excess of $20,000. The average amount of bail for those charged with narcotics offenses never released was $212,000, and the average amount set for nondrug defendants was $19,300.

Case Dispositions - Of those 105 defendants never released, 1 (.9%) was discharged, 5 (4.8%) were dismissed, 6 (5.7%) were acquitted, and 93 (88.6%) were convicted.

Of the 93 defendants convicted, 19 (20.4%) received a probation sentence; 2 (2.2%) received probation, fine and restitution; 10 (10.8%) received a split sentence (custody and probation); 59 (63.4%) received custody sentences; 2 (2.2%) received custody, fine, and restitution; and 1 (1.1%) received a mixed sentence (probation to follow prison term).

Of the 59 sentenced to custody, 10 (16.9%) received 1-6 months, 11 (18.6%) received 7-18 months, 20 (33.9%) received 19-36 months 10 (16.9%) received 37-60 months, 4 (6.8%) received 61-84 months, 1 (1.7%) received 85-108 months, 1 (1.7%) received 109-132 months, and 2 (3.4%) received 133-999 months.

Sixty-one (58%) of those defendants never released were charged with drug offenses.

Of the 61 defendants that were charged with drug offenses and never released, 1 was discharged, 2 were dismissed, 4 were acquitted, and 54 were convicted.

Of those convicted, 1 received probation, 1 received probation, fine, and restitution, and the remaining 52 received custody sentences. The average length probation sentence for those never released was 15 months. Forty-eight of the 52 custody sentences were straight custody sentences with 6 (11.5%) receiving 1-6 months, 11 (21.2%) receiving 7-18 months, 20 (38.5%) receiving 19-36 months, 8 (15.4%) receiving 37-60 months, 4 (7.7%) receiving 61-84 months, and 1 each receiving 85-108, 109-132, and 133-999 months. The average length of sentence for those who were convicted of drug offenses and never released pretrial was 36 months. The average length of sentence in the 10 Pretrial Services Agency districts for this category was 59 months.

## SUMMARY

Drug offenders make up over 50% of the defendants in the Southern District of Florida and prosecution for drug related offenses is on the increase. The offenses most frequently charged were selling and importation of cocaine and marijuana. Of those defendants charged with drug offenses, less than 50% were U.S. citizens, over 50% were Hispanic of Latin American origin, and almost one-half of the defendants had lived in the district less than one month at the time the offense for which they were charged occurred. We could verify prior criminal record in only 26% of the drug cases. Money bail exceeding $20,000 was set for 63% of the drug defendants resulting in a 92.3% release rate and of those released, 17.6 failed to appear after bail was set. The average amount of bail for those charged with drug offenses who appeared for trial was $41,000. The average length of sentence for the drug offender receiving a custody sentence is 44 months.

Of those defendants charged with drug offenses who failed to appear, 74% were of undetermined citizenship, 75% were Hispanic origin, 85% had been in the district for less than a month at the time the offense occurred, and of those who failed to appear, 73% remain in fugitive status. We could verify prior criminal record in only 21.5% of the cases and only 5.2% were found to have other charges pending at the time of release. The average amount of bail set for those charged with drug offenses who failed to appear was $75,800 compared to $212,000 average bail set for those charged with drug offenses who were detained and never released pretrial. For the 26% who failed to appear but were later returned to court and sentenced to custody, the average amount of bail was $57,100 and the average sentence was 59 months.

In 10 districts where comparable data have been collected by Pretrial Services, drug offenders account for approximately 20% of the total number of defendants and the prosecution for drug related offenses have shown a slight decline over the past 2 years. The offenses most often charged in the ten districts are possession and distribution. Of those defendants charged with drug offenses, 87% were U.S. citizens, 58% were white, 38% were black, and 10.4% were Hispanic. Only 11.8% of those drug offenders in the 10 demonstration districts had lived in the district for less than one month prior to committing the offense for which they were charged. In this category 46.9% were found to have a prior record with 16.6% having other charges pending at the time of release. Money bail exceeding $20,000 was set for 19% of these defendants resulting in an 88% release rate and of those released, 1.6% failed to appear. The average bail set for those who were released and appeared for trial and disposition with no failure to appear was $25,000. The average length of sentence for the drug defendants receiving custody sentences was 33 months.

Of those 48 defendants who failed to appear, 68.8% were U.S. citizens. Thirty-nine point six percent of those who failed to appear were caucasion, 31.3% were black, and Hispanics accounted for 20.8%. Only 10.4% of the 48 defendants who failed to appear had been in the district for less than one month prior to committing the crime for which they were charged. In this group, 25.4% had a prior record and 40.3% had other offenses pending at the time of release. The average amount of bail set for those charged with drug offenses that appeared for trial and final disposition was $16,000. The average length of sentence for those receiving a custody sentence in this group was 46 months.

The volume and dollar value of drugs per defendant in the Southern District of Florida is immense - many times greater than the volume and dollar value of drugs per defendant in the 10 Pretrial Services Agency districts or nationally. In addition, the impact of plea bargaining and a defendant's cooperation with the government are variables that we cannot assess. The volume of drugs, plea bargaining, and cooperation with the government all may have substantial impact on the release conditions and the length of final sentence.

The frequency of drug offenses, the value of the drugs per offense, citizenship, ethnicity, length of time in the community, and criminal history appear to be the variables that reflect the greatest contrast between the defendants in the Southern District of Florida who fail to appear and those in the 10 Pretrial Services Agency districts.

Senator HATCH. Our next witness will be Senator Nancy Kassebaum from Kansas.

The subcommittee is well-aware of your leadership in other legislative areas, Senator, but particularly understands that you introduced the first bill in the 97th Congress to allow some consideration of the dangerousness of an offender in setting bail.

Your bill, S. 440, is based on what we consider to be very sound judicial principles.

We commend you for your leadership in this matter as well, and we are very interested in hearing what you have to say.

## STATEMENT OF HON. NANCY LANDON KASSEBAUM, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator KASSEBAUM. Thank you, Mr. Chairman.

It is a pleasure to be here. I recognize that you regard bail reform legislation as an important matter and commend you for commencing these hearings.

Senator HATCH. Thank you.

Senator KASSEBAUM. I think that Senator Chiles' bill which targets drug trafficking is worthy of careful consideration within the context of bail reform.

I know in the coming months that the Judiciary Committee will be discussing in great detail a number of other problem areas within the subject of violent crime.

As we all know, the interest and concern among our constituents about crime is increasing. As our economy improves, I expect to see it assume an even higher priority in the minds of all Americans.

Naturally, the most feared crime is the violent crime that most directly affects our personal health and well-being. Given the high rate of recidivism, one of the best methods of reducing violent crime is by getting these offenders off the streets and keeping them off the streets.

The role of bail in this matter is quite clear and our experience bears out our intuition. When arrested individuals are let out on bail, there is an unacceptably high probability that they will commit other crimes. One study indicates that more than 36 percent of repeat offenders arrested were on bail for previous crimes.

The process of modifying current law has already begun. On February 6 of this year, I introduced S. 440 which, as you mentioned, would reduce the incidence of personal recognizance releases and strengthen the Government's opportunity to detain offenders who evidence a proclivity for future crime. More recently, the Justice Department Task Force on Violent Crime has recommended several important changes. I have also noted with more than just a passing interest that eight members of the Judiciary Committee, including yourself and Senator Thurmond, have recently introduced a bipartisan proposal for bail reform.

I am heartened by the broad support for these efforts, and I am confident that we can all look forward to enactment of some much-needed reforms in Federal bail law.

It is important to note at the outset that action at the Federal level is not dispositive of the issue because crimes that are State offenses are not within the scope of Federal law. However, action taken here can set an example for the States to follow. I, personally, feel this is very important. The converse can also be true. Some States have already enacted legislation to permit denial of pretrial release to some defendants upon a showing that they would not appear for trial or would commit a serious offense pending trial. Although some have argued that these laws violate the eighth amendment or due process of law, lower courts have tended to uphold them. Further, Chief Justice Warren Burger has criticized current Federal bail laws which prohibit judges from considering a defendant's potential danger to society when setting bail.

There can be little dispute that the eighth amendment does not guarantee a right to bail for all suspects. The members of this committee certainly are well aware that all the Constitution requires is that bail not be excessive.

Certainly, the eighth amendment does not preclude considering the dangerousness of the defendant in bail proceedings. In fact, I believe that the absense of an absolute guarantee of bail can be seen as tacit approval by the framers of the Constitution for considering the need to protect our citizens against those likely to commit crimes while out on bail.

In order to comply with the fifth amendment proscription of restraints on liberty without due process, it is not necessary to conclude that pretrial detention can never be allowed. It requires an analysis of the nature of the restriction and the need for it. Thus, the defendant's liberty interest must be weighed against the need for detention.

Given this background, I believe that Congress erred in 1966 when in passing the Bail Reform Act it virtually mandated release on personal recognizance in all but the most egregious cases. For this reason, my bill would repeal these provisions of current law and would permit magistrates and courts to release defendants on personal recognizance only in those cases where he produces convincing evidence of his responsible character, family and community responsibility, and lack of prior criminal record. I believe this discretion is essential for courts to adequately address the divergent circumstances they must confront on a daily basis.

Current bail law also often has the peculiar result of encouraging the use of an extensive criminal record as the justification for release. If the defendant's record is a lengthy one, so the argument goes, he clearly has a good record of appearing for trial so he should be released. Judges are placed in the awkward position of being legally bound to ignore what may be a very real threat to the community. To the extent that judges follow the dictates of the law, I submit that good public policy is not being served. To the extent that the law is ignored, then the law is not practical or workable and we engender further disrespect for the law in general.

Mr. Chairman, I believe that the effect of the 1966 Bail Reform Act's mandatory personal recognizance provision has been to shackle the trial court's ability to utilize alternative forms of bail, such as sureties and corporate bonds in questionable cases. The trial courts, although best able to assess the circumstances affecting the defendant's character in the community, law-abiding tendencies, employment, family stability, and other factors, have been denied the discretion to do so in favor of an inflexible standard which has permitted release of many defendants who have then committed additional offenses and often fail to appear, becoming fugitives who must be located and recaptured.

The direction this subcommittee is willing to take is a most encouraging development. I am happy to lend my assistance to this laudable effort, and I thank you for the opportunity to testify this afternoon.

Senator HATCH. Thank you.

In your statement accompanying the introduction of S. 440, as well as your testimony today, you build a good case, in my opinion, for how current bail provisions might undermine public confidence in the judiciary. Could you give us your impression of the impact the present bail laws have on the public perception of the judiciary? What do the people feel about the judiciary as a result of bail laws that preclude any consideration of risks to community safety?

Senator KASSEBAUM. I think there has been a great deal of worry and probably not even a good understanding of what bail law is all about. There is a justified concern that crimes are committed by those out on bail without any real understanding of why someone who has committed a crime would even be out in public prior to trial.

I think this has exacerbated the public's fear of crime and I agree that it sabotages public confidence in our entire law enforcement system.

Senator HATCH. Thank you. We appreciate your testimony.

Senator KASSEBAUM. Thank you.

Senator HATCH. Our next witness is Senator Bumpers.

We are pleased to have the opportunity to hear from you today. We welcome you to the subcommittee.

In addition to your credentials as one of our colleagues, we believe you are more than well qualified to speak on the topic of bail reform by virtue of your authorship of S. 482, a bill introduced earlier this year to allow pretrial detention of criminal suspects who may pose a danger to the community if released.

We are very happy to have you here, and we will turn the time over to you now.

## STATEMENT OF HON. DALE BUMPERS, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator BUMPERS. Thank you, Mr. Chairman.

If I may, Mr. Chairman, I will summarize my statement by saying that I suppose my bill, S. 482, may be a little more stringent—as a matter of fact, I think it is more stringent—than any of the bail bond reform proposals here.

We all know that right now when someone is arrested, he is taken forthwith before a magistrate and the magistrate has two choices: he can release that person on his own recognizance or he can require a bail bond or a money bond. The judge has only one thing that he can take into consideration under existing law. That is whether or not that person will appear for trial.

Obviously, if it is someone who has never been charged with another offense and the offense is not violent, in cases like that, the court will almost always release people on their own recognizance or a very small bail bond.

Where that is not the case, then the court must determine what is reasonably calculated to assure that that defendant shows up for trial.

As you know, right now that is the only criteria that he may use. Then you have a little constitutional constraint, which I will come back to in just a moment, that creates some confusion about how far Congress can go in bail reform.

That deals, of course, with the constitutional provision which says that the court may not set excessive bail.

My bill simply adds additional criteria. Under my bill the court can take into consideration whether or not that defendant has been guilty of dangerous offenses before, whether he is violent, or whether he is likely to perpetrate another crime if he is released on any money bail.

If the court finds that the defendant has such a predilection for violence—if he is a one- or two-time loser having previously committed dangerous crimes and very conceivably would commit a crime if he were released on bail, even before he came to trial—then the court can refuse to make bond.

You and I both know that the ACLU and a lot of people are very strongly opposed to this approach. However, this is not something that some of us just thought up; it is an idea whose time has come, in my opinion.

I am not for locking up innocent people, nor am I for preventive detention of people who are not likely to commit a crime.

Let me just say that in my State of Arkansas, during the last year, murder has increased by 2.3 percent, forcible rape by 4.9 percent, and robbery by 14.6 percent. The people in my State and the people in Utah are demanding that we do something.

While what we are doing here will only deal with Federal crimes, we can hope—and justifiably expect, I think—that the States will follow our lead. Most of the States will pass similar legislation.

Let me give you some of the statistics on why I think it is important that we come up with some kind of preventive detention to keep dangerous persons off the streets once they are arrested.

A study by the Institute of Law and Social Research found that over 13 percent of all the persons arrested for felonies here in the District of Columbia were rearrested before trial. Indications are that crime or bail is an even greater problem in the State courts.

The Lazar Institute study, a study of 10 selected jurisdictions, was funded by the National Institute of Law Enforcement. It involved over 5,000 defendants. It found that about one of every six defendants released was rearrested at least once during the release period. Of those rearrested, almost one-third were rearrested more than once. About 40 percent of the rearrests were for violent crimes.

The Washington Metropolitan Police Department had a study that was limited to those indicted for armed robbery and released before trial. It indicated that 35 percent of the armed robbery defendants were indicted for at least one additional felony while on release. A larger study of over 500 indicted armed robbery defendants reported a 70-percent rearrest rate while on pretrial release.

Here is a D.C. bail agency study of 1975. It found that 33 percent of all persons charged with a crime in the District of Columbia in 1975 were on some type of release from the criminal justice system at the time they were arrested: 15 percent were on pretrial release, 13 percent were free under some form of post-conviction supervision, such as parole, and 5 percent were on both pretrial release and post-conviction programs.

I have several more in my prepared statement, but I am not going to go into them here. I do want to address two constitutional problems with the whole bail reform thing.

I have just stated one, of course, which is the eighth amendment to the Constitution. It says very straightforwardly: "Excessive bail shall not be required."

Legal scholars have been arguing a long time about whether that means that everybody is entitled to bail. It is my own position, and I think there is adequate justification for our believing from the decisions, that that does not guarantee everybody bail.

In the *United States* v. *Edwards* case here is what the D.C. court said:

> The Supreme Court has never ruled on whether the excessive bail clause imports a right to bail. Lower courts have relied alternatively on dicta of both *Carlson* and *Stack* to find or deny a constitutional right to bail but without any convincing resolution.

The court in *Edwards* upheld the constitutionality of the District of Columbia preventive detention statute, finding that it was not inconsistent with the eighth amendment.

Mr. Chairman, it is my conclusion that the eighth amendment grants no absolute right to bail.

I agree with the language of the Eighth Circuit Court of Appeals in *Hunt* v. *Roth* which was handed down on May 13 of this year when they said:

> There exists a strong argument that bail may be properly denied without encroaching on constitutional concerns where a judicial officer weighs all the appropriate factors and makes a reasoned judgment that the defendant's past record demonstrates that bail will not reasonably assure his or her appearance or that he or she because of the overall record and circumstances poses a threat to the community.

That is consistent with the dicta in *Carlson* v. *Landon* decided by the Supreme Court in 1952 in which the court noted:

> The very language of the amendment fails to say that all arrests are bailable.

Mr. Chairman, the rest of my testimony goes pretty much to the due process clause, in which I cite extensively from *Bell* v. *Wolfish,* which was a 1979 Supreme Court decision.

I do not believe that a refusal to bail is a violation of due process.

Finally, one of the most important parts, and I left this for last because I wanted to impress this on the committee, is that my bill requires the defendant under certain circumstances—and this is one of the things, admittedly, that some of the civil libertarians are most upset about in my bill—to go forward with proving that he is both entitled to bail and that he represents no threat to the community if he is bailed.

Mr. Chairman, that in substance is it. I ask unanimous consent that my formal remarks be admitted for the record.

Senator HATCH. Without objection, it will be included in the hearing record at the completion of your oral testimony.

Let me just ask one question of you.

Your bill really puts the burden on the defendant, as you have just expressed, to show by clear and convincing evidence that he poses no danger to the community. Does this at all abridge the rule of evidence that a defendant is presumed innocent until proven guilty?

Senator BUMPERS. That is a question that the former chairman of this committee, Senator Kennedy, and I have argued a number of times. He thinks it does; I think it does not.

This is not a question of his innocence or guilt. This is a question of whether or not he poses a threat to the community and is therefore entitled to bail.

Senator HATCH. We appreciate your testimony, and I am glad we were able to hear from you.

Senator BUMPERS. Thank you, Mr. Chairman.

[The prepared statement of Senator Bumpers follows:]

# STATEMENT OF SENATOR BUMPERS

## BEFORE CONSTITUTION SUBCOMMITTEE

## BAIL REFORM

SEPTEMBER 17, 1981

MR. CHAIRMAN, THANK YOU FOR THE INVITATION TO TESTIFY TODAY IN SUPPORT OF STRENGTHENING OUR FEDERAL BAIL LAWS. IN FEBRUARY, I INTRODUCED S. 482, AND I AM A COSPONSOR OF S. 1554. BOTH OF THESE BILLS WOULD STRENGTHEN OUR CURRENT BAIL LAWS BY ALLOWING COURTS TO DETAIN UNTIL TRIAL THOSE DEFENDANTS ARRESTED AND CHARGED WITH FEDERAL CRIMES WHO ARE LIKELY TO FLEE OR POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR TO THE COMMUNITY.

SEVERAL MONTHS AGO, CHIEF JUSTICE WARREN E. BURGER, IN HIS ADDRESS TO THE AMERICAN BAR ASSOCIATION IN HOUSTON, FOCUSED THE ATTENTION OF THE NATION ON THE PROBLEM OF CRIME AND SUGGESTED THAT THIS KIND OF REFORM OF OUR BAIL LAWS WOULD BE IN ORDER. MORE RECENTLY, THE PRESIDENT'S VIOLENT

CRIME TASK FORCE, CHAIRED BY OUR DISTINGUISHED FORMER ATTORNEY GENERAL, GRIFFIN BELL, RECOMMENDED A TOUGHENING OF OUR BAIL LAWS AS WELL.

MR. CHAIRMAN, THE CRIME PROBLEM IS COMPLEX AND MULTI-FACETED, AND THOUGHTFUL PERSONS AGREE THAT THERE ARE NO EASY SOLUTIONS. AT THE SAME TIME, WE NEED NOT BE PARALYZED BY IT. WE MUST FOCUS ON SPECIFIC SOLUTIONS. CHIPPING AWAY AT THE PROBLEM IS BETTER THAN TAKING NO ACTION AT ALL. I AM CONFIDENT THAT THE 97TH CONGRESS CAN TAKE A SIGNIFICANT STEP IN THE RIGHT DIRECTION BY REFORMING OUR BAIL LAWS, AND SO I HOPE THAT THIS SUBCOMMITTEE WILL GIVE SERIOUS CONSIDERATION TO THESE BILLS.

MR. CHAIRMAN, UNDER CURRENT LAW WHEN A PERSON IS ARRESTED AND CHARGED WITH A FEDERAL CRIME, HE IS BROUGHT IMMEDIATELY BEFORE A U. S. MAGISTRATE OR DISTRICT JUDGE FOR A BAIL DETERMINATION. THE JUDGE HAS TWO CHOICES: HE MAY RELEASE THE DEFENDANT UNTIL TRIAL ON HIS OWN RECOGNIZANCE, THAT IS, ON THE DEFANDANT'S WRITTEN PROMISE THAT HE WILL SHOW UP AT TRIAL; OR, SECOND, THE JUDGE MAY IMPOSE ONE OR MORE CONDITIONS ON THE DEFENDANT'S RELEASE, SUCH AS THE PAYMENT OF A MONEY BOND OR RESTRICTIONS ON TRAVEL. IF THE DEFENDANT IS ABLE TO MEET THE CONDITIONS IMPOSED, HE WILL GO FREE UNTIL TRIAL. UNDER THESE PROCEDURES, 85%-90% OF DEFENDANTS ARE RELEASED UNTIL TRIAL, AND TRIAL USUALLY IS NOT HELD UNTIL SEVERAL WEEKS AFTER THE DEFENDANT'S ARREST. ONLY THOSE WHO CANNOT MEET ONE OF THE CONDITIONS IMPOSED, WHICH IS USUALLY THE PAYMENT OF MONEY BOND, ARE HELD IN JAIL UNTIL TRIAL. UNDER CURRENT LAW, THE ONLY ISSUE THE JUDGE IS TO CONSIDER IN MAKING A BAIL DETERMINATION IS WHAT CONDITION OR SET OF CONDITIONS WILL REASONABLY ASSURE THAT THE DEFENDANT WILL SHOW UP FOR TRIAL. THE JUDGE IS NOT SUPPOSED TO CONSIDER WHETHER THE DEFENDANT, BECAUSE OF A HISTORY OF CRIMINAL BEHAVIOR OR OTHER DANGEROUS ACTIVITY, IS LIKELY TO COMMIT ANOTHER CRIME OR THREATEN THE SAFETY OF OTHER PERSONS WHILE ON BAIL, UNLESS OF COURSE SUCH

CONSIDERATIONS ARE RELEVANT TO THE PREDICTION WHETHER THE DEFENDANT WILL SHOW UP AT TRIAL.

THE NEWSPAPERS ACROSS THE COUNTRY ARE FULL OF STORIES OF VIOLENT CRIMES BEING PERPETRATED ON INNOCENT VICTIMS BY DEFENDANTS WHO ARE FREE ON BAIL. THE CRIME RATE NATIONWIDE CONTINUES TO STAGGER US DESPITE THE VALIANT EFFORTS OF OUR LAW ENFORCEMENT OFFICIALS. ONE SENSIBLE CHANGE IN THE LAW WHICH COULD IN A SMALL YET SIGNIFICANT WAY HELP STEM THIS SWELLING TIDE OF CRIMINAL ACTIVITY IS TO GIVE JUDGES THE POWER TO JAIL PENDING TRIAL THOSE DEFENDANTS WHO, BECAUSE OF A HISTORY OF VIOLENT OR DANGEROUS BEHAVIOR, OR ARE LIKELY TO POSE A DANGER TO THE COMMUNITY.

CONGRESS SIMPLY MUST ADDRESS THE CRIME PROBLEM IN OUR NATION, AND WE MUST ACT QUICKLY. OUR CITIZENS DO NOT FEEL SECURE IN THEIR HOMES. FBI STATISTICS SHOW A 15% INCREASE IN VIOLENT CRIME IN THE LAST FIVE YEARS. IN MY STATE OF ARKANSAS, DURING THE LAST YEAR ALONE MURDER AND MANSLAUGHTER INCREASED BY

2.3%, FORCIBLE RAPE BY 4.9%, AND ROBBERY BY 14.6%. WE CANNOT CONTINUE TO ALLEGE THAT WE ARE THE FREEST NATION ON EARTH AND SIMULTANEOUSLY BE HELD CAPTIVE TO FEARS OF BEING A VICTIM OF A CRIMINAL ACT. I AM AWARE THAT MUCH OF THE VIOLENT CRIME WHICH OCCURS FALLS WITHIN THE PROVINCE OF THE STATE COURTS AND MUST BE FOUGHT ON THE STATE LEVEL AS WELL. I AM CONVINCED, HOWEVER, THAT WE NEED A CONCERTED EFFORT COMBINING THE RESOURCES AND INGENUITY OF THE FEDERAL GOVERNMENT, THE STATES, AND EVEN OUR CITIES AND COUNTIES, IF WE INTEND TO DO ANYTHING WHICH SIGNIFICANTLY DECREASES CRIME NATIONWIDE. CRIME COMMITTED BY DEFENDANTS ON PRETRIAL RELEASE IS A SIGNIFICANT PROBLEM WHICH OUGHT TO BE ADDRESSED ALONG WITH MANY OTHERS. THE PRECISE SCOPE OF THE PROBLEM IS UNKNOWN BECAUSE MUCH CRIME GOES UNREPORTED AND BECAUSE ACCURATE STATISTICAL INFORMATION IS DIFFICULT TO COME BY. A STUDY BY THE INSTITUTE OF LAW AND SOCIAL RESEARCH FOUND THAT OVER 13% OF ALL PERSONS ARRESTED FOR FELONIES COMMITTED IN THE DISTRICT

OF COLUMBIA WERE REARRESTED BEFORE TRIAL, AND INDICATIONS ARE THAT CRIME ON BAIL IS AN EVEN GREATER PROBLEM IN STATE COURTS.

LET ME BRIEFLY MENTION SEVERAL OTHER STUDIES:

LAZAR INSTITUTE STUDY. THIS STUDY OF TEN SELECTED JURISDICTIONS WAS FUNDED BY THE NATIONAL INSTITUTE OF LAW ENFORCEMENT AND INVOLVED OVER 5000 DEFENDANTS. IT FOUND THAT ABOUT ONE OF EVERY SIX DEFENDANTS RELEASED WAS REARRESTED AT LEAST ONCE DURING THE RELEASE PERIOD. OF THOSE REARRESTED, ALMOST ONE THIRD WERE REARRESTED MORE THAN ONCE, AND ABOUT 40% OF THE REARRESTS WERE FOR SERIOUS CRIMES.

WASHINGTON METROPOLITAN POLICE DEPARTMENT STUDY 1966-67. THIS STUDY WAS LIMITED TO THOSE INDICTED FOR ARMED ROBBERY AND RELEASED BEFORE TRIAL. IT INDICATED THAT ABOUT 35% OF THE ARMED ROBBERY DEFENDANTS WERE INDICTED FOR AT LEAST ONE ADDITIONAL FELONY WHILE ON RELEASE. A LARGER STUDY OF OVER 500 INDICTED ARMED ROBBERY DEFENDANTS REPORTED A 70% REARREST RATE WHILE ON PRETRIAL RELEASE.

D. C. BAIL AGENCY STUDY 1975. THIS INVESTIGATION FOUND THAT 33% OF ALL PERSONS CHARGED WITH A CRIME IN THE DISTRICT OF COLUMBIA IN 1975 WERE ON SOME TYPE OF RELEASE FROM THE CRIMINAL JUSTICE SYSTEM AT THE TIME: 15% WERE ON PRETRIAL RELEASE, 13% WERE FREE UNDER SOME FORM OF POST-CONVICTION SUPERVISION SUCH AS PAROLE, AND 5% WERE ON BOTH PRETRIAL RELEASE AND POST-CONVICTION SUPERVISION.

NATIONAL BAIL SURVEY 1975. THIS STUDY WAS CONDUCTED IN 72 CITIES THROUGH A MAILED QUESTIONNAIRE. THE OVERALL REARREST RATE WAS 7%. FORTY-FIVE OF THE CITIES RESPONDING HAD REARREST RATES OF LESS THAN 10%, AND 15 CITIES HAD REARREST RATES OF BETWEEN 10% AND 19%.

MR. CHAIRMAN, ONCE WE HAVE DETERMINED THAT THE FACTS JUSTIFY A CHANGE IN OUR BAIL LAWS TO ALLOW THE DETENTION OF DANGEROUS DEFENDANTS BEFORE TRIAL, THE NEXT QUESTION WE MUST ADDRESS IS RESTRAINTS IMPOSED BY THE CONSTITUTION. OUR ANALYSIS MUST BEGIN WITH THE 8th AMENDMENT, WHICH STATES SIMPLY AND STRAIGHTFORWARDLY THAT "EXCESSIVE BAIL SHALL NOT BE REQUIRED. . ."

WE HAVE RECEIVED LITTLE GUIDANCE FROM THE U. S. SUPREME COURT ABOUT WHAT THIS MEANS. AS THE DISTRICT OF COLUMBIA APPELLATE COURT SAID IN UNITED STATES V. EDWARDS:

> "THE SUPREME COURT HAS NEVER RULED ON WHETHER THE EXCESSIVE BAIL CLAUSE IMPORTS A RIGHT TO BAIL....LOWER COURTS HAVE RELIED, ALTERNATIVELY ON DICTA OF BOTH CARLSON AND STACK TO FIND OR DENY A CONSTITUTIONAL RIGHT TO BAIL, BUT WITHOUT ANY CONVINCING RESOLUTION."

_____A.2D____ (D.C. APP. 1981). THE COURT IN EDWARDS UPHELD THE CONSTITUTIONALITY OF THE DISTRICT OF COLUMBIA PREVENTIVE DETENTION STATUTE, FINDING THAT IT WAS NOT INCONSISTENT WITH THE 8TH AMENDMENT.

IT IS MY CONCLUSION, MR. CHAIRMAN, THAT THE 8TH AMENDMENT GRANTS NO ABSOLUTE RIGHT TO BAIL. I AGREE WITH THE LANGUAGE OF THE 8TH CIRCUIT COURT OF APPEALS IN HUNT V. ROTH, HANDED DOWN ON MAY 13 OF THIS YEAR:

> "...THERE EXISTS A STRONG ARGUMENT THAT BAIL MAY BE PROPERLY DENIED WITHOUT ENCROACHING ON CONSTITUTIONAL CONCERNS WHERE A JUDICIAL OFFICER WEIGHS ALL THE APPROPRIATE FACTORS AND MAKES A REASONED JUDGMENT THAT THE DEFENDANT'S PAST RECORD DEMONSTRATES THAT BAIL WILL NOT REASONABLY ASSURE HIS OR HER APPEARANCE OR, ARGUENDO, THAT HE OR SHE, BECAUSE OF THE OVERALL RECORD AND CIRCUMSTANCES, POSES A THREAT TO THE COMMUNITY."

_____F.2D_____(9TH CIR. 1981). THIS IS CONSISTENT WITH THE DICTA IN THE CARLSON V. LANDON CASE, DECIDED BY THE SUPREME COURT IN 1952, IN WHICH THE COURT NOTED THAT "THE VERY LANGUAGE OF THE AMENDMENT FAILS TO SAY THAT ALL ARRESTS ARE BAILABLE." 342 U.S. 524, 546.

TURNING TO THE QUESTION OF WHETHER PREVENTIVE DETENTION WOULD VIOLATE THE DUE PROCESS GUARANTEES OF THE 5TH AMENDMENT, THE RECENT DECISION IN BELL V. WOLFISH, 441 U.S. 520 (1979) REINFORCES THE

CONCLUSION THAT THE PREVENTIVE DETENTION MAY BE ENFORCED IN A MANNER THAT PASSES CONSTITUTIONAL MUSTER. IN WOLFISH, THE COURT DEALT WITH THE DUE PROCESS RIGHTS OF PRETRIAL DETAINEES AND REJECTED THE RELIANCE BY THE LOWER COURT ON THE PRESUMPTION OF INNOCENCE AS A SOURCE OF THE DETAINEE'S SUBSTANTIVE RIGHT TO BE FREE FROM CONDITIONS OF CONFINEMENT NOT JUSTIFIED BY COMPELLING NECESSITY. THE COURT SAID THAT THE PRESUMPTION OF INNOCENCE IS A DOCTRINE THAT ALLOCATES THE BURDEN OF PROOF IN CRIMINAL TRIALS, BUT, THE COURT POINTED OUT, "IT HAS NO APPLICATION TO A DETERMINATION OF THE RIGHTS OF A PRETRIAL DETAINEE DURING CONFINEMENT BEFORE HIS TRIAL HAS EVEN BEGUN." ID. at 533.

MR. CHAIRMAN, WHILE DUE PROCESS CLEARLY GOVERNS THE RESTRAINTS TO WHICH AN ACCUSED MAY BE SUBJECTED PRIOR TO TRIAL, IT DOES NOT FOLLOW THAT DUE PROCESS REQUIRES THE ACCUSED TO BE AFFORDED THE FULL PANOPLY OF RIGHTS REQUIRED BEFORE PUNISHMENT FOR COMMISSION OF A CRIME MAY BE IMPOSED. AS THE COURT IN WOLFISH MADE CLEAR, THERE IS A DISTINCTION BETWEEN PUNITIVE

MEASURES THAT MAY NOT CONSTITUTIONALLY BE IMPOSED BEFORE THE ACCUSED IS FOUND GUILTY, AND REGULATORY RESTRAINTS THAT MAY BE IMPOSED. THE DETERMINATIVE QUESTION IS WHETHER PREVENTIVE DETENTION IS PUNITIVE OR REGULATORY IN NATURE. IT IS CLEAR TO ME THAT IT IS MERELY REGULATORY. ALL WE ARE TRYING TO DO HERE IS MAKE SURE THAT THE DEFENDANT SHOWS UP FOR TRIAL AND THAT HE DOES NOT HARM ANOTHER PERSON IN THE INTERIM. AS THE DISTRICT OF COLUMBIA APPELLATE COURT HELD IN THE EDWARDS CASE DECIDED ONLY A FEW MONTHS AGO:

> "THE TRADITIONAL REASONS FOR PRETRIAL DETENTION, PREVENTING FLIGHT OR THE INTIMIDATION OF WITNESSES, SERVE THE 'ALTERNATIVE PURPOSE' OF PRESERVING THE INTEGRITY OF THE JUDICIAL PROCESS, AND ARE THUS PREVENTIVE AND FORWARD-LOOKING. SIMILARLY, PRETRIAL DETENTION TO PREVENT REPETITION OF DANGEROUS ACTS BY INCAPACITATING THE DETAINEE SEEKS TO CURTAIL REASONABLY PREDICTABLE CONDUCT, NOT TO PUNISH FOR PRIOR ACTS."

FINALLY, MR. CHAIRMAN, SINCE THE DUE PROCESS CLAUSE IS APPLICABLE, WE MUST RESOLVE THE QUESTION OF WHAT PROCESS IS DUE. ALL OF US ARE AWARE OF THE U. S. SUPREME COURT CASES THAT MAKE CLEAR THAT DUE PROCESS IS NOT A FIXED CONCEPT, BUT IS FLEXIBLE. IT DEPENDS ON THE NATURE OF THE INTEREST OF BOTH THE DEFENDANT IN NOT BEING WRONGLY DETAINED, ON THE ONE HAND, AND THE INTEREST OF THE GOVERNMENT IN ASSURING THE PRESENCE OF THE DEFENDANT AT TRIAL AND THE SAFETY OF THE COMMUNITY. I HAVE STUDIED THE PROVISIONS OF S. 1554 AND AM CONVINCED THAT IT PROVIDES APPROPRIATE PROCEDURAL DUE PROCESS PROTECTIONS. IT REQUIRES A HEARING BEFORE DETENTION, AT WHICH THE DEFENDANT IS TO BE REPRESENTED BY COUNSEL, AND IT REQUIRES FINDINGS THAT THE DEFENDANT IS EITHER LIKELY TO FLEE OR TO POSE A DANGER TO THE COMMUNITY AND THAT THERE IS A SUBSTANTIAL PROBABILITY THAT THE DEFENDANT COMMITTED THE OFFENSE CHARGED.

IN CONCLUSION, MR. CHAIRMAN, LET ME SAY THAT I AM GLAD THAT THIS COMMITTEE IS GIVING SERIOUS AND

THOUGHTFUL CONSIDERATION TO THE WHOLE QUESTION OF BAIL REFORM. THOUGHTFUL AMERICANS ARE CONCERNED ABOUT THE PROBLEM OF CRIME COMMITTED ON PRETRIAL RELEASE, AND WE CAN DO SOMETHING ABOUT THIS PROBLEM. AUTHORIZING PRETRIAL DETENTION WILL NOT SOLVE THE CRIME EPIDEMIC IN THIS COUNTRY. IT WON'T BE A PANACEA. BUT IT IS A CONSTRUCTIVE AND CRUCIAL STEP IN THE RIGHT DIRECTION, AND ONE WHICH THIS BODY SHOULD TAKE WITHOUT FURTHER DELAY.

Senator HATCH. The subcommittee is pleased now to hear from a legal authority with extensive hands-on experience with bail. Mr. James Anders is the U.S. district attorney in Columbia, S.C.

Today Mr. Anders is appearing on behalf of the National District Attorneys Association. The president of the association, Mr. David Armstrong, just recently finished serving on the violent crime task force. Although his schedule did not allow him to attend our hearing today, he said that he could send one of the Nation's best district attorneys in this field.

I think that is a high compliment for you, Mr. Anders, and we look forward to hearing your experiences with bail and the position of your association with regard to this topic.

## STATEMENT OF JAMES C. ANDERS, SOLICITOR, COLUMBIA, S.C., REPRESENTING NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Mr. ANDERS. Thank you, Senator.

Senator HATCH. I have to slip out for just a minute, but I would like you to begin. I will be back in in just a few minutes.

Mr. ANDERS. Thank you very much.

I have been in private practice for 7 years prior to being elected the State district attorney in Columbia, S.C. My practice primarily was in the Federal system for the first 7 years. I have been involved in the State system for the latter 7 years.

I would like to state first of all that I do support the bill, S. 1554. I think because of certain sections, it has broadened it to the extent that it takes into consideration so many other things other than the likelihood of the flight of the defendant. It takes into consideration the community.

I think that is really what we need to look at today. We need to look at balancing the rights of the individual and the rights of the public. In doing so, I would like to refer to something. I hope that we can adopt the entire paper that I presented, and I will just make reference to it.

The State of South Carolina has already adopted an approach of balancing the rights and needs of both the community and the defendant. If you look at exhibit 1 attached to my paper, you will notice that we already look at the unreasonable danger to the community which might result from the release of an individual on bond.

In addition, I have consulted with the Federal magistrates for the State of South Carolina, Charles Gambrell and William Catoe, both of whom have expressed strong support for the changes in the proposed statute that would allow consideration of danger to the community in the setting of bail bonds.

Both of them emphasize the futility and even danger of allowing certain offenders suspected of heavy drug trafficking to be released on surety bonds. The inevitable consequence of such a release is the disappearance of the defendant, even after having posted, in my State of South Carolina in one case recently, a half million dollar bond.

To these defendants, forfeiture of bond is simply regarded as a cost of doing business. I certainly would concur with Senator Chiles in his statement earlier with respect to the drug traffickers.

I would like to emphasize the area dealing with career criminals.

As a group, career criminals pose the greatest threat to the public of all criminals. S. 1554 needs to take this fact into account by proposing that if a defendant is charged with a crime punishable by death or life imprisonment or if a defendant is charged with a serious or violent offense and has been convicted of such offense within the previous 10 years, then the judge is to detain the defendant until trial unless some condition or combination of conditions will reasonably assure the safety of other persons in the community.

As the chief prosecuting attorney for the Fifth Judicial Circuit of South Carolina, I recognized the dangers posed by career criminals some years ago. I instituted a special career criminal division designed to perform the special task of prosecuting major offenders.

The profile of our career criminal division is similar to that which I have proposed for inclusion in S. 1554 and similar to the provisions in Senator Bumpers' bill, S. 482—two or more convictions for a high court offense within the previous 10 years.

The chief prosecutor for the division represents the State at bail bond hearings of each career criminal.

I can personally attest to the success such a program has in preventing career criminals from committing crime while awaiting bail.

Of the defendants designated as career criminals in the fifth judicial circuit, only 28 percent have been released on bail prior to trial. Of those released, 34 percent are subsequently rearrested for crimes committed while on bail. You see a very high percentage of recidivism, even when we target and identify these individuals.

Senator HATCH. Mr. Anders, I will have to interrupt you for a few minutes. We will return to your testimony shortly.

[Recess taken.]

Senator HATCH. We will now proceed with your testimony, Mr. Anders.

Mr. ANDERS. Thank you, Senator.

I had referred to the career criminal program that we had and to the experience we had in that area.

In S. 482, Senator Bumpers refers also to the career criminal program by way of so stating.

There are three types of bonds. Some people are not really familiar with those three types of bonds. You have a personal recognizance or a contract, so to speak, with the individual that he is going to appear for court. If he fails to appear, he faces further punishment including payment of money and time in prison. The same is true with a surety bond. Then we have the cash bonds themselves.

I would like to bring attention to exhibit 3 of my paper which deals with the assignment of deposits of cash funds that are placed with the clerks of the courts. This would not be a bad practice for the Federal courts to use more often.

More so, it usually brings about the appearance of the defendant.

In my particular jurisdiction over the past 2½ years, we have had 2,115 persons jump bond and leave the jurisdiction. Of those, 74 percent were P.R. bonds, 22 percent were surety bonds, and only 4 percent were cash bonds.

Of course, these cash bonds being used to make restitution for victims when they are so entitled is a fund created that is useful.

Furthermore, the money could be assigned to the lawyer representing the defendant. It seems that they can generally find money to get out of jail, but they have difficulty in finding funds to hire attorneys. It could be used for that.

Again, Senator, we support this bill because of the broadened discretion that is given to the magistrates. We do not ask that the discretion of the magistrates be limited or the district judges in any respect, so they can take all of these things into consideration and better establish bail if it is necessary or release on P.R. bond or the placement of cash money with the courts.

Thank you.

Senator HATCH. Thank you.

Let me just ask a couple of questions of you.

When you have a case where a defendant is obviously dangerous and should be detained prior to trial, how do you make the case to the judge that he should be held when the code does not allow consideration of dangerousness? It seems to me that you can only argue that he might not return for his trial. Then how do you go about convincing the judge to detain the suspect?

Mr. ANDERS. It is difficult at times under the present law to be able to properly get across to the judge some of the circumstances that particularly surround an individual. I think your bill, S. 1554, broadens the area for the judge's consideration of what he is going to do to another individual or going to do to the community. All of those things can be taken into consideration. We think it would be advantageous to pass your bill.

Of course, the States are most likely in the future to adopt these bills; so it is extremely important to every court in the United States that this be as broad as possible in our opinion.

Senator HATCH. We have had judges testify before various congressional committees that they have resorted to subterfuge in order to detain suspects that they felt were dangerous.

Are you aware of judges stating that they are detaining individuals on the fear that they may flee when the real consideration might have been actual danger?

Mr. ANDERS. Sometimes judges will indicate to an individual when he is brought in. The best thing a U.S. magistrate can do, in my opinion, is get the parents of an individual on a bond if he is a younger person. Making sure that he is not a threat to the community is a difficult thing to do.

Sometimes they are held awaiting discussions with their court-appointed attorneys, so that they might look into the background.

If the U.S. magistrates and district judges would utilize the probation persons, they could get a complete background on an individual before he is released. The public would be better benefited and protected thereby.

Senator HATCH. In American jurisprudence, judges are often called upon to make judgments based on their findings of potential for future activities. For instance, when balancing the protection of the public against the first amendment right to hold demonstrations, courts must often weigh the potential for violence. Does it bother you that judges will be making determinations of future conduct based on past performances? Is there any other way to balance the safety of the community against the rights of a suspect?

Mr. **ANDERS**. I know of no better way than to give the people who are trained in the area. No one is clairvoyant. No one can predict the future. Unfortunately, I myself at one time thought an individual would not be of harm to the community and recommended that he be released on bond. He fled to Florida and killed an individual.

When you have to use your discretion, it is not always easy.

I think that judges tend to be more conservative. If you, for example, were to leave S. 1554 as it is with nothing other than a P.R. bond, I think that more people will be detained than will be released. I think probably an opposite result from what some may like to attain in that bill will come about.

I think you will see judges saying: I am not going to take the chance. I do not think he is a good risk on a P.R. bond, and he is going to stay in jail awaiting trial.

Senator **HATCH**. Thank you, Mr. Anders. We appreciate your efforts in being here.

Mr. **ANDERS**. Thank you.

[The prepared statement of James C. Anders follows:]

## PREPARED STATEMENT OF JAMES C. ANDERS

For some years, the United States has been beleaguered by persistent and long-term increases in crime. Statistics released recently by the Federal Bureau of Investigation indicate that the soaring crime rate has not abated, and will probably not do so in the near future.[1] To counter this trend, government needs to attack the problem in a concrete, cohesive fashion. In the words of Senator Bumpers, "I am convinced . . . that we need a concerted effort combining the resources and ingenuity of the federal government, the states and even our cities and counties, if we intend to do anything which significantly decreases crime nationwide. Crime committed by defendants on pretrial release, although a small percentage of overall crime, is still a significant problem which ought to be addressed along with many others."

The need for reform of current federal bail laws is no where better expressed than by the statistics which have been generated by studies on crime committed by defendants while they are released on bail pending trial:

> "One recent study found that approximately thirteen percent of felony defendants in the District of Columbia were arrested for crimes committed while they were free on bail. In another study, sixty-five percent of those arrested for auto theft were arrested for another auto theft while out on bail. Other crime categories also showed high arrest rates during the pretrial release period: larceny and forgery, forty percent; robbery, thirty-three percent; and burglary, twenty-seven percent. The failure of our bail laws to balance the likelihood of the defendant's appearance at trial with the needs of community safety indicates the need for reform."[2]

It is my position that S.1554 provides many of the needed reforms in the area of federal bail law.

Perhaps the greatest flaw in the current system of federal law is that a judge may only consider those factors which are likely to secure a suspect's appearance at future court proceedings in deciding whether to release a suspect on bail.[3] S.1554 would change this approach by permitting the judge to also consider what potential dangers a suspect might pose to individuals or the community in the event of release. Such change simply attempts to give statutory recognition to the unfortunate reality that substantial crime is, in fact, committed by defendants who have been released on bail.

The problem with the current federal law is that it recognizes the rights of defendants to be free prior to conviction, yet fails to factor in the rights of the community to be equally as free from the very real dangers posed by the pretrial release on bail of certain dangerous individuals. As stated by Senator Kennedy,

> "Expanding the bail decision to incorporate considerations of community safety presents two basic concerns. First, some scholars argue that to consider factors other than flight is contrary to the presumption of innocence and undermines the accused's constitutional protections. Second, it is difficult to predict with any degree of certainty which suspects are likely to pose a danger to the community. Nevertheless, the critical problem of crimes committed by persons on bail cannot be ignored. Statistics indicate that the likelihood of a person committing additional crimes while on bail is not only higher than the crime rate for the general population, but that it is also much higher than the likelihood of the suspect's failing to appear at trial. Further, although federal and state bail laws largely ignore these facts, judges do not. It appears to be an established practice for judges to set high bail or to jail a suspect because the court is convinced the accused is dangerous and will commit another crime if released. Community safety is, therefore, an underlying consideration in bail decisions even though most statutes speak only in terms of flight.
> This approach is neither candid nor fair. Moreover, such ad hoc bail decisionmaking promotes arbitrariness because no candid reason is articulated for granting or denying bail in a particular case." [4]

The State of South Carolina has already adopted the approach of balancing the rights and needs of both the community and the defendant. (See Exhibit 1.) In addition, I have consulted with the federal magistrates for the State of South Carolina, Charles Gambrell and William Catoe, both of whom have expressed strong support for the changes in the proposed statute which would allow consideration of danger to the community in the setting of bail decision. Both emphasized the futility, and even danger, of allowing certain offenders suspected of heavy drug trafficking to be released on surety bonds. The inevitable consequence of such a release is the disappearance of the defendant, even after having posted up to $500,000 bond. To these defendants, forfeiture of the bond is simply regarded as a cost of doing business.

Current federal bail law, with its focus solely on a suspect's likelihood of flight, also fails to take into account the special dangers posed by repeat offenders, or 'career criminals.' A recent cover story on violent crime by Time Magazine puts the problem of career criminals into sharp perspective:

> For all the arguments among law officers and criminologists about what the statistics really mean, there is widespread agreement on one point: a large share of all violent crime is committed by a surprisingly small group of hard-core criminals. One study of repeat offenders in Washington, D. C. showed that 7% of the criminals arrested in a four-and-a-half-year period had been apprehended four times--and this 7% accounted for 24% of all the serious crimes considered solved in those years . . .
>
> Increasingly, the vast majority of America's law-abiding citizens are being held hostage to the irrational acts of a relatively small cadre of career criminals. 5

Thus, the dangers posed by career criminals--even while merely out on bail--cannot be adequately addressed by merely considering the possibility of securing their reappearance in court at some future time.

As a group, career criminals pose the greatest threat to the public of all criminals. S.1554 needs to take this fact into account by proposing that if a defendant is charged with a crime punishable by death or life imprisonment or if a defendant is charged with a serious or violent offense and has been convicted of such an offense within the previous 10 years then the judge is to detain the defendant until trial, unless some condition or combination of conditions will reasonably assure the safety of any other persons and the community. In the words of Senator Bumpers,

> ". . . it simply makes sense . . . that those who have been convicted of violent or serious crimes or who are charged with crimes punishable by death or life imprisonment, should not walk the streets unrestrained unless the court finds that they are not dangerous. I realize that predicting dangerousness

> is a difficult task, but the difficulty of the task is no excuse for failing to carry it out if there are compelling reasons to do so." 6

As chief prosecuting attorney for the Fifth Judicial Circuit of South Carolina, I recognized the dangers posed by career criminals some years ago and instituted a special Career Criminal Division designed to perform the special tasks of prosecuting major offenders. The profile of our Career Criminal Division is similar to that which I have proposed for inclusion in S.1554 and similar to provisions in Senator Bumpers' Bill S.482—two or more convictions for 'high court' offenses within the previous ten years. The chief prosecutor for the division represents the state at bail bond hearings of each career criminal. I can personally attest to the success such a program has in preventing career criminals from committing crime while awaiting trial. Of the defendants designated as career criminals in the Fifth Judicial Circuit, only 28% are released on bail prior to trial; of those released, [redacted] 34% are subsequently re-arrested for crimes committed while on bail. If such provisions were included in S.1554, there would no doubt result a significant crime reduction at the federal level.

S.1554 also proposes that courts be allowed to detain any defendant for up to 10 days who is charged with an offense while on pretrial release for a felony or while on parole or probation under federal or state law. Such time period is necessary to allow the court or official who initially released the defendant to take custody over him. The defendant's rights are again safeguarded in that the court may detain such a defendant for the 10-day period only if it finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. If no official comes to take custody, the defendant is treated as any other defendant who is arrested and charged with a federal offense.

This provision attempts to prevent from happening in the federal courts the current situation in our state courts wherein such re-arrested defendants are re-released prior to the time it takes for officials to institute custody proceedings. After release under such circumstances, the defendant, faced with the substantial possibility of serving time for probation or parole violation, or of pretrial detention for a bond violation, has a great incentive to flee rather than face new and possibly more serious charges. The 10-day detention proposal of S.1554 is a reasonable way in which to alleviate this problem.

S.1554 also requires that the court detain those defendants who have been convicted and are awaiting either sentencing or appeal no more than 10 days unless the court finds that no condition or combination of conditions will assure that the defendant is not likely to flee or to pose a danger to the community. This provision attempts to counter the recurring problem of the defendant who, having been convicted and facing the possibility of serving time, chooses to flee or to carry out retribution against those in the community who assisted in the conviction. By detaining convicted defendants, such problems would be alleviated.

Finally, S.1554 mandates one condition for pretrial release (no criminal violations) and allows others to be imposed at the discretion of the court — such conditions generally requiring 'good behavior' by the defendant while released on bail. South Carolina has substantially the same requirements for release. (See Exhibit 2.) It should be noted from personal experience, however, that while such conditions should be included as a part of any pretrial release, they are certainly no substitute for the proposed reforms which I have already discussed, because the administrative and supervisory problems encountered when attempts are made to insure compliance with such conditions are nearly insurmountable.

With respect to Section 3142(c)(2)(k), which allows for the forfeiture of property as an optional condition of release, I would suggest that such property be made assignable in a manner similar to our South Carolina Statute. (See Exhibit 3.) This statute allows for a 10% security to be assigned to the defense attorney, who might otherwise be left uncompensated for his legal services. Such assignability of property would allow for similar methods of payment to the federal defense attorneys.

In summary, I strongly support the passage of the Bail Reform Act Amendments of 1981. S.1554 provides constructive reform in an area where such reform is badly needed. If we are to quell the rising tide of crime in our nation, it will take the concerted efforts and united resources of all levels of government--Federal, State and local. By passing S.1554 the federal government can assume a leading position in the fight against rising crime. Passage of S. 1554 will be a positive step in eradicating that significant portion of crime which is committed in our nation by those who are released pending trial on bail.

I advocate the passage of S.1554.

1 The F.B.I.'s Crime Index of reported serious crimes increased 9% in 1980 over 1979. The Crime Index was 18% higher in 1980 than in 1976 and 55% higher than in 1971. The United States population increased at a slower rate during those same years--2% since 1979, 5% since 1976, and 9% since 1971. The national crime rate, which relates the crime volume to population, increased 7% in 1980 over 1979, 12% over 1976, and 42% over 1971. (U. S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports, 'Crime in the United States, 1980' 1981)

2 Senator Edward Kennedy, A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform, Fordham Law Review, Vol. 48, pp. 423-436, at 423-424.
Statistics from Institute for Law & Social Research, PROMIS Research Project No. 16 (1978), and D. C. Bail Agency, How Does Pretrial Supervision Affect Pretrial Performance? 15 (1978)

3 18, U.S.C. §3146 (1976)

4 Senator Edward Kennedy, supra, at 427-429

5 Time Magazine, The Curse of Violent Crime; March 23, 1981, Vol. 117, No. 12, p. 21

6 Senator Dale Bumpers, Congressional Record - Senate, S.1307, Feb. 17, 1981

## EXHIBIT 1

### § 17-15-10. Person charged with noncapital offense may be released on his own recognizance; conditions of release.

Any person charged with a noncapital offense triable in either the magistrate's county or circuit court, shall, at his appearance before any of such courts, be ordered released pending trial on his own recognizance without surety in an amount specified by the court, unless the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required, or unreasonable danger to the community will result. If such a determination is made by the court, it may impose any one or more of the following conditions of release:

(a) Require the execution of an appearance bond in a specified amount with good and sufficient surety or sureties approved by the court;

(b) Place the person in the custody of a designated person or organization agreeing to supervise him;

(c) Place restrictions on the travel, association or place of abode of the person during the period of release;

(d) Impose any other conditions deemed reasonably necessary to assure appearance as required, including a condition that the person return to custody after specified hours.

**HISTORY: 1962 Code § 17-300; 1969 (56) 383.**

## EXHIBIT 2

### § 17-15-20. Conditions of appearance recognizance or appearance bond.

Every appearance recognizance or appearance bond will be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what shall be enjoined by the court, and not to depart the State, and be of good behavior toward all the citizens thereof, or especially toward any person or persons specified by the court.

**HISTORY: 1962 Code § 17-300.1; 1969 (56) 383.**

## EXHIBIT 3

### § 17-15-15. Deposit of cash percentage in lieu of bond; assignment of deposit; restitution to victim.

(a) In lieu of requiring actual posting of bond as provided in item (a) of § 17-15-10, the court setting bond may permit the defendant to deposit in cash with the clerk of court an amount not to exceed ten percent of the amount of bond set, which amount, when the defendant fulfills the condition of the bond, shall be returned to the defendant by the clerk except as provided in subsection (c).

(b) The cash deposit provided for in subsection (a) shall be assignable at any time after it is posted with the clerk of court by written assignment executed by the defendant and delivered to the clerk. After assignment and after the defendant fulfills the condition of his bond, the clerk shall return the cash deposit to the assignee thereof.

(c) In the event the cash deposit is not assigned but the defendant is required by the court to make restitution to the victim of his crime, such deposit may be used for the purpose of such restitution.

**HISTORY: 1980 Act No. 393, § 2A, eff April 30, 1980.**

Senator HATCH. The subcommittee feels particularly honored today to have present one of the Nation's leading legal scholars on the subject of bail reform, Prof. Daniel J. Freed.

Professor Freed is currently teaching at the Yale Law School. For the last 18 years, however, the professor has been active in a debate over proper bail procedures and standards.

He served at the Department of Justice from 1959 to 1969 and was codirector of the National Conference of Bail and Criminal Justice in 1964.

He is coauthor with Mr. Wald of "Bail in the United States, 1964," a book which preceded his pivotal work in fashioning from the Justice Department the Bail Reform Act of 1966.

He served as Director of the Office of Criminal Justice of the Department.

Since joining Yale in 1969, he has been named director of the Guggenheim program at the Criminal Justice and Pretrial Service Resource Center.

We are honored to have your viewpoint here today, Professor Freed. We think this is one of the more important criminal justice issues of our day.

We will be pleased to proceed with your testimony.

## STATEMENT OF DANIEL J. FREED, PROFESSOR, SCHOOL OF LAW, YALE UNIVERSITY

Mr. FREED. Thank you, Mr. Chairman. I appreciate your invitation to appear today.

Before taking up the statement I have prepared for this hearing, I would like to comment on the testimony of the four witnesses who preceded me.

I would like to do this because I think the major issue before this committee is a problem in understanding how the bail system works.

Several witnesses have said that most members of the public, while worried about the bail system, do not understand it. That is an eminently correct statement.

But some of the witnesses today have erred in their own understanding of the bail system, and I would like to comment on their statements before I get to my own.

Senator HATCH. Professor, I have to step out for just a minute. Would you continue to make this record, and I will come right back.

Mr. FREED. Mr. Counsel, I feel a bit uncomfortable in undertaking now to comment on the statements of three Senators who have preceded me with no Senator in the Chair. However, if that is the way in which the committee wishes to proceed, I will make my record.

### THE TESTIMONY OF SENATOR CHILES OF FLORIDA

First, the statement of Senator Chiles:

Senator Chiles appeared to strongly support changing the bail statute to permit courts to consider a defendant's danger to the community. I agree with that position with some modifications in language that I will make later.

But Senator Chiles said, with respect to the Bail Reform Act, that it requires courts to take only one factor into account—appearance at trial—and that courts may not consider the prior criminal record of the accused or the nature of the crime. The Senator is mistaken.

Explicitly in the Bail Reform Act and in most State statutes, the nature and circumstances of the offense, the seriousness of the charge, and the prior criminal record of the accused are the first listed criteria for a court to consider. That is a matter of Federal bail law; it is a matter of State bail law. Courts everywhere consider those factors.

Senator Chiles also stated in lamenting the very unfortunate bail jumping problem in the southern district of Florida, that no matter how high the bail is set the drug dealers will make bail and flee.

Again, it is a mistake to think that bail law requires such a result. If drug dealing defendants are known to the Government and known to the court to be able to raise a high bail and likely to flee, there is no obligation under Federal bail law, or any other bail law I know, for courts to set the bail low. Ten dollars may be too high for a person who has no money; a million dollars may be too low for someone who has $10 million he is willing to pay in order to flee the country.

It is a mystery why bail has been set too low in the southern district of Florida, for defendants who are known to be likely to flee.

However, that may not be the fact. I have never seen with respect to drug defendants who come before the court in Florida the nature of the recommendations for bail that are made by the U.S. attorney, or the nature of the information presented to the court by the U.S. attorney, or the extent to which the court sets bail conditions at a level different than recommended by the Government. That sort of inquiring is essential if we are to understand the Florida bailjumping problem.

No court is obligated to set bail at an amount that will permit the defendant to flee. The purpose of bail is to assure appearance at trial. A court need not let a defendant post his own money if it is known that that money is the price of escape rather than a guarantee of appearance.

Finally, Senator Chiles referred to five elements in his proposed legislation dealing with drug dealers. He would like the courts to be able to consider a drug dealer's prior conviction of drug offenses, whether he was on probation or parole at the time of his arrest, whether he was an alien, whether he was in possession of a false passport, or whether he was a fugitive from justice.

All five of these criteria are relevant considerations to the setting of bail in the Federal courts today. Congress need pass no new statute to assure that courts will consider these factors when so urged by the Government.

Senator Chiles' testimony today made no case for changing Federal bail laws. But there may well be a case for examining more carefully the administration of bail in Florida.

### THE TESTIMONY OF SENATOR KASSEBAUM OF KANSAS

Second, Senator Kassebaum:

The Senator stated that the eighth amendment does not guarantee a right to bail and that it does not preclude consideration of dangerousness. I agree with both of those statements.

The Senator then said that the absence of an explicit right to bail in the eighth amendment was implied recognition by those who wrote the Constitution that the Federal courts could deny bail.

That cannot possibly be correct. A month before the Congress adopted the eighth amendment to the Bill of Rights, it passed the Judiciary Act of 1789. That law guaranteed explicitly a right to bail for Federal defendants in noncapital cases. There was nothing implicit to wonder about.

Congress did two things at once: It adopted a constitutional provision to guard against excessive bail, and it adopted a statutory provision guaranteeing a right to bail.

Third, Senator Kassebaum stated that the Bail Reform Act mandates release on personal recognizance in all but the most egregious cases. That is wrong. There is no such provision in the Bail Reform Act. The Bail Reform Act sets up a hierarchy of release conditions. Personal recognizance is to be preferred only when it fully guarantees, in the court's view, that the defendant will appear as required. If the court has any doubt, it is authorized to consider other conditions of release, including money bail and including part-time detention.

### THE TESTIMONY OF SENATOR BUMPERS OF ARKANSAS

Senator Bumpers stated that the excessive bail clause does not give an absolute right to bail. He agreed there with his predecessor Senators. In terms of the explicit language of the eighth amendment, Senator Bumpers is correct.

He then went on, as his statistical foundation for urging a preventive detention statute in the Federal system, to cite four studies: one by the Institute of Law and Social Research, one by the Lazar Institute—both in recent years, one by the D.C. Bail Agency in 1975, and one by the police department in the District of Columbia during the 1960's. The Senator's evidence misses the target he aimed at.

The record should be clear that Congress enacted a preventive detention statute for the District of Columbia in 1970. Thus all of the major studies of crime on bail that have been cited by Senator Bumpers, and previously cited by Senator Kennedy, by Chief Justice Burger, and by the Attorney General's Task Force on Violent Crime, come from the first jurisdiction in the United States to have a preventive detention statute.

Those statistics to me are evidence of the failure of preventive detention to deal adequately with the problem of crime on bail in Washington, D.C. They make no case whatever for a Federal detention statute. They show that even the strictest kind of statute, where the authority to impose preventive detention was added to the authority in the District of Columbia for money bail—which is quite different from what S. 1554 recommends, the problem of crime on bail has not been brought under control.

### THE TESTIMONY FROM SOUTH CAROLINA

Finally, the district attorney for Columbia, S.C., made reference to changes in the bail law of his State. My own reading of the bail laws of South Carolina indicate that the courts have been authorized to release on recognizance without a surety unless the court determines that unreasonable danger to the community will result.

The statute further goes on to authorize the court to impose a bond which, among other things, requires the defendant to be of good behavior.

Both of these provisions are missing from Federal bail law. They are provisions which I think make sense and ought to be added to Federal bail law.

What the district attorney has given us today are some examples of language which ought to go into Federal law. But it would be a mistake to interpret the South Carolina statute and experience as any precedent for Federal preventive detention.

The district attorney made two other statements that ought to be emphasized. One is that at one time he, in retrospect, made an error in recommending the release of the defendant who subsequently fled and committed another crime. That is not, to my mind, evidence of the defect in any statute or of the failure of any lawyer to uphold his oath of office. That, to me, is an example of the unpredictability of human behavior.

It says that even the most experienced law enforcement officers cannot distinguish dangerous persons from harmless persons, particularly prior to trial. That is an example of a human characteristic that needs to be borne in mind in thinking about whether bail statutes can be written to guard against the dangerousness problem in the future.

Finally, the district attorney told us that in his opinion, S. 1554 will detain more persons than it will release if adopted for the Federal system. If he is correct, since the Federal bail system today has one of the highest release rates in the United States, compared with the States, what it means is that Congress will have to appropriate millions of dollars to increase the size of Federal jails to detain many more defendants. And all this without a showing, on the record as of now, that there is any problem of crime on bail in the Federal system.

Senator HATCH. Professor Freed, forgive me for having to go out there; but we had representatives of the National Council of Catholic Bishops who wanted to just see me for a minute. I just wanted to extend that courtesy, but at the same time it was somewhat discourteous to you.

I apologize to you, but I assure you that I am very interested in what you have to say and will read everything you have said.

Mr. FREED. Thank you, Mr. Chairman.

Senator HATCH. Please proceed.

Mr. FREED. Does counsel think I should summarize for the chairman what I have said, or should I just proceed with my statement?

Senator HATCH. I think that will be fine. I will definitely review the testimony.

We will put all of your statement into the record and any other submissions you would care to make. We will leave the record open for that.

Mr. **Freed**. What I tried to do in your absence, sir, was to summarize by the statements of other witnesses some illustrations of the extent to which even experts fail fully to understand the nature of the bail system, its history, and the provisions of current law.

In making my own statement now, there are several points I would like to stress.

The first is that from the evidence that has been submitted so far to the Congress in this hearing today, by the Attorney General's Task Force on Violent Crime in August, and any other source, there appears to be no evidence of a general Federal court problem of crime on bail.

There is significant evidence that crime on bail is a disturbing problem in a number of our State courts.

Senator **Hatch**. Is that even in drug cases like Senator Bumpers indicated?

Mr. **Freed**. As I understood Senator Chiles, he was talking principally about a failure to appear problem in the southern district of Florida. I have no doubt that there is such a problem. I commented on it earlier, and I will reach that again in my statement.

The second point I would like to make is that the Federal bail system is significantly better, in terms of its legislation and its resources, than most bail systems in the States. What the Federal system stands for is the proposition that bail systems around the United States can be significantly improved.

The third point I would like to make is that there is a very large incidence of pretrial detention in the Federal courts today. The issue before this committee is not whether Federal courts should be permitted to detain defendants, but how.

The only dispute, as I see it, between the present system and the laws that have been proposed deals with the procedures by which pretrial detention would be brought about.

The final and ultimate question is whether preventive detention is the proper remedy and will be an effective remedy to the problem of crime on bail that you are considering.

The issue in these hearings, in sum, is whether Congress should attempt to reduce crime on bail in the State courts by repealing the right to bail in Federal courts. I think the answer is no.

### THE JUDICIARY ACT OF 1789

The right to bail prior to conviction has been the consistent rule in the Federal courts since the founding of this Nation. The Judiciary Act of 1789, enacted by the First Congress, provided that upon all arrests in criminal cases, bail shall be admitted except where the punishment may be death.

The range of Federal crimes expanded significantly in the 19th and 20th centuries, but the death penalty was rarely prescribed. As a result, the right to bail in the history of this country has encompassed an ever-larger proportion of Federal criminal cases.

Throughout our history, in times of turmoil—and the one we are living in now is not the only period of turmoil—as well as in times of tranquility, the right to bail has remained the starting point for judicial proceedings to determine whether and on what terms an accused person should be released.

S. 1554 and other bills before your subcommittee would terminate that history. They would substitute a discretionary judicial power to order preventive detention in noncapital cases for accused persons whose release is believed to endanger the safety of any other person or the community. They would convert bail into a process designed to anticipate and combine the traditional functions of the criminal trial, the jury verdict, and the sentence.

Many sponsors and supporters have urged this kind of legislation as a model for the States. What kind of model would it be?

In three-quarters of the States, a bill patterned after S. 1554 would have to be struck down for violating the express bail language of the State constitution.

Second, in felony courts everywhere, the enactment of this bill would substitute complex detention litigation for the simple bail hearings that have long sufficed as the route to keeping high risk persons in jail.

This legislation would impose on magistrates and judges the painful choice between deciding a defendant's fate immediately after arrest or deferring judgment until trial.

I do not know whether preventive detention litigation of this sort would ultimately detain more or fewer defendants. Some judges would no doubt increase their pretrial detention rate out of a heightened sense of anxiety in every serious case. Other judges would rigorously apply the new statutory tests and refuse to detain whenever their crystal ball was cloudy.

Without doubt, S. 1554 would create hearings that would take longer, cost more, and needlessly increase the proceduralism of the criminal law.

I share with the chairman and with other senatorial sponsors of these bills the strong desire to reduce crime in the streets.

Some provisions of these bills—like the authority to consider danger to the community in setting bail conditions, and like the authority to revoke bail for violation of release conditions, and like the authority for Government appeal in pretrial release cases—could advance that goal by fair and effective means. I support those provisions.

Other provisions in these bills—like the duty to predicate the denial of bail on findings of probable past guilt and future dangerousness, or the abolition of surety bail, would needlessly complicate the task of law enforcement and would needlessly impair the rights of unconvicted persons.

These provisions sound very bold when quoted in political speeches. In practice, I think they will produce chaos.

I plan to analyze these troublesome provisions in the context of the history of the bail process. I plan to discuss the relationship of bail to the realities of trials and sentencing and criminal justice administration.

In my view, S. 1554, judged in that context, is a very nicely drafted set of theories and procedures that have nowhere passed the test of practicality. At the moment, the provisions of S. 1554 are much more suitable for classroom discussion than courtroom adoption.

As the chairman mentioned in his initial statement, I have been closely involved in bail administration in and out of the Department of Justice for nearly 18 years. I will be frank in saying that at one time I believed, as many Senators believe today, that it would be preferable for us to have an honest and candid system of pretrial release or detention. I was an advocate of straightforward decisions—"you are released," or "you are detained." I thought that would be superior to what is clearly a flawed process of setting money bail in serious criminal cases.

Further study persuaded me that that was not such a good idea. A closer look at the system in practice and at the history of bail in both England and the United States has persuaded me that a pure system of in and out decisions on the day of arrest, or shortly thereafter, would produce more costs than benefits.

This judgment is not based on a preference for the rights of suspects over the public safety. It is based instead on an assessment of how an impartial judicial system would respond to this kind of statute.

I propose to outline several reasons why thoughtful legislators—conservatives and liberals alike—ought to reject those features of S. 1554 that have no precedent and in my view are unworkable.

At the end, I plan to offer a few suggestions to improve the public safety features of the bail process as well as to restore public confidence in its administration.

A sobering question to ponder before replacing surety bail by an explicit system of in/out decisions is: Why didn't our forefathers think of that?

### INDIRECT DETENTION

Why did the first Congress and every one of the 50 States, adopt a bail system with indirect detention via money bail rather than a straightforward system of release or detention? Why should we confer the right to an ambiguous decision rather than simply tell the defendant to go to jail or to go home? What have we learned that our 18th century predecessors did not know? Or what did they know that we have forgotten?

Throughout this Nation's history, the bail process has served an intentionally limited function in the administration of the criminal law. It has attempted to balance, in the setting of release conditions, the respective and often conflicting interests of the State and the accused.

On the one hand, bail was to be set to preserve the defendant's right not to be punished unless and until he was found guilty by due process of law. At the same time, bail was to safeguard the State's interest in assuring that the defendant would appear for his trial and submit to punishment in the event of conviction. The object was to protect the State's interest in criminal prosecution without prejudging the case.

Different defendants posed different risks. The bail process, therefore, constantly adjusted bail conditions to the individual characteristics of the defendant and the alleged crime—to the record of reliability, to the likelihood of conviction, and to the potential severity of the sentence.

Even though the basic Federal statute of 1789 conferred a right to bail, that right never meant an absolute right to release. The prior witnesses are absolutely right in that respect.

Inevitably, many defendants were released by complying with the court's bail conditions, while many others were held in custody for failing to comply.

At no time have courts ever made findings about dangerousness or probable guilt as prerequisites to bail setting. Trial judges thought about those factors constantly, but they discreetly avoided making prejudicial announcements.

Appellate decisions in this country, in Federal and State courts alike, often reflect the discomfort that the judiciary has when upholding high bail because the evidence is strong, and at the same time denying that that assessment has any relevance to the defendant's guilt.

## BAIL MISTAKES

Throughout history, courts have always made some mistakes in the setting of bail. Whenever you look at decisions in retrospect, some turn out wrong. Some released persons demonstrate their unreliability by failing to appear at trial or by being rearrested. Some detained persons will ultimately be acquitted or will be convicted but not given custodial sentences.

To the extent that outcomes like this demonstrate that the original bail decision was too lenient or too severe, such errors are often inevitable.

This acknowledgment flows from the fact that the information available at the bail stage about defendants and crimes is typically fragmentary. A hasty judicial assessment of pretrial risks and eventual case outcomes is at best a guess.

No one ever thought it possible to make perfect predictions about the future behavior of defendants or the future verdicts of juries. At all times, the setting of bail conditions has been a process dependent upon judicial discretion and a process beset by uncertainty.

The principal reforms of recent years have been modest efforts within the confines of the historic system. They have served to increase the availability of information to judges for making bail decisions. They have served to increase the measures of control available to courts when releasing high-risk persons. They have served to reduce needless detention. And they have served to reduce the period of risky pretrial release.

The Bail Reform Act of 1966, the Speedy Trial Act of 1974, and the 5-year experiment with pretrial service agencies which led this committee and the Senate on June 18 of this year to pass the proposed Pretrial Services Act of 1981 have each contributed to the capacity of Federal courts to carry out the limited role of bail administration in a fair, speedy, and effective fashion.

That is a very brief sketch of bail's history, but it does not answer the question: Why did not bail statutes and courts consider whether defendants would endanger the community if released?

### THE SURETY SYSTEM

My study of the traditional operation of the surety bail system, which is now largely abandoned, suggest that in fact they did. Courts and bail statutes have considered danger to the community in the past.

I would like at this point to now describe the central role of the surety which does not exist today but did exist at the time the Constitution was drafted and the Judiciary Act of 1789 was passed. The old surety existed for the better part of 100 years thereafter.

Anyone who examines the history of the money bail system will find that its operation today varies in important respects from the way it worked up to the 19th century. The discrepancy has nothing to do with the Bail Reform Act. It does deal with a turn of the century resolution of an important bail controversy that divided the Nation's courts during the late 1800's.

The history is long, but I can outline its essentials quickly. For purposes of terminology, the transformation may be described as a shift from surety bail to money bail.

The historic surety process used to place an accent on the personal relationship between the defendant and a friendly surety who agreed to take custody of him under terms set by the court. The modern money process emphasizes a commercial relationship involving an entrepreneur who was paid, and usually indemnified, for agreeing to be responsible for the defendant's appearance in court.

The switch from the old personal system to the new commercial relationship reflected an evolutionary change in the values underlying the bail system. The historic surety system had stressed a responsible citizen's faith in the character and reliability of the defendant for whom surety bail had been set.

In fact, it was not uncommon for a court to set bail with the requirement of two, three, or four sureties. Chief Justice Marshall in 1803 set bail with four sureties in advance of the treason trial of Aaron Burr.

If a defendant was unable to find willing sureties, or was unable to secure court approval of their undertakings, he remained in custody. The uncompensated pledge of the surety to produce his defendant in court carried with it an implied belief in the likelihood that the defendant would behave responsibly while awaiting trial. It also implied confidence that the surety could supervise, control, or influence that behavior.

### BAIL ON GOOD BEHAVIOR

Our colonial history is dotted with illustrations of statutes and cases that spoke in terms of bail to assure appearance and good behavior in the meantime.

That language was included in the Massachusetts Body of Liberties as early as 1641. It appears in the history of Connecticut, Pennsylvania, and North Carolina. It continues in the law of Rhode Island today, and it has been enacted recently not only in South Carolina, as we heard a little while ago, but also in Virginia.

The significance of the old-fashioned personal surety who stood bail without indemnification is that he influenced both the safety of pretrial release and the incidence of pretrial detention. If sureties agreed to help the defendant, their testimonial and their supervision tended to increase the likelihood of good behavior. If they refused to help him, the defendant was locked up in jail.

The virtue of the surety system was also its weakness. The very selectivity of sureties, in light of the financial penalty they risked in the event of default, meant that many defendants could not find willing sureties.

In a frontier society where the population was moving West and where immigrants were arriving from other countries, America was a Nation of strangers. The historic institution of the friendly surety, established in more stable times and places, did not fit the needs of American criminal courts.

### THE RISE OF THE BONDSMAN

As a result, there grew up the idea of the hired surety—of the businessman who for a fee and an indemnification contract would agree to bail a stranger. These commercial relationships were focused on assuring the paying client's appearance in court.

There was no testimonial to the good character of the defendant. There was no agreement to guarantee his behavior. None was offered by the bondsman and none was required by the court.

Courts accepted these commercial arrangements in order to facilitate pretrial release. It was important to courts in the 19th century to prevent pretrial jails from being overloaded needlessly. If a court worried about the high risk of a defendant in a serious case, it set high bail. If a bondsman was willing to post bond for the defendant, that was usually deemed sufficient for safe release. It was not a perfect system, but it was better than keeping all strangers and friendless and poor defendants in custody awaiting minor as well as major trials.

### THE LEARY CASE

A clash between these two systems—the surety bail system that was safe and the money bail system that was liberal—came to a head in the Supreme Court decision in the early 1900's of *Leary* v. *United States,* in an opinion written by Justice Holmes.

The question was whether an indemnification agreement by a defendant to a surety which was allowed by a statute of the State of New York should be declared against public policy in the Federal court. The argument was as follows:

An indemnification agreement means an agreement by a defendant to pay the surety in the event the surety forfeited his bond because the defendant ran away. The question was whether that kind of indemnification agreement where the surety could go find the defendant, sue him, and get his money back, was against public policy.

The argument that it was against public policy was based on its tendency to undermine the pledge of the surety that the defendant would appear in court.

By a divided vote, but nevertheless a substantial majority, the court enforced the indemnification contract. It ruled, in effect, that the change from a surety system to a money bail system made it a matter of indifference to the courts whether a surety forfeited his money or produced the defendant.

I think many of us would find that a shocking decision in today's fear of crime climate. However, in the early part of this century, that decision reflected the fact that the court preferred the liberality of a money bail system which served to release a lot of people to the security of a surety bail system which served to detain a lot of people.

The court upheld the policy of easier pretrial release and less detention, as against the proposed policy of safer pretrial release and more detention.

### THE NEBBIA CASE

Recent Federal cases indicate that Federal courts, despite *Leary*, retain inherent power to insist on reliable sureties upon penalty of not granting pretrial release at all.

This line of authority, typified by the *Nebbia* case in the second circuit, makes it clear that a bail court is not obliged to grant release to a high risk defendant just because bail money is tendered. A court may reject a surety when it feels that his relationship to the defendant is suspect, or when it is unclear whether the surety's purpose in putting up money is to guarantee appearance or guarantee escape. A court may also decline to set or accept cash bail from a defendant if it deems that a reliable surety is essential to assure appearance.

My own reading of some of the statements of witnesses before Congressman Zeferetti's committee, dealing with the bail jumping in Florida, suggests that the Federal courts in Florida may not make the kind of detailed inquiry into the relationship between sureties and defendants, and into the adequacy of cash bail, the way courts in some other parts of the country do. This seems to be a problem of bail administration under present law, and not a matter requiring change in bail law.

The entire relationship—modern and historical—between money bail and surety bail warrants reexamination by the Congress. Such an inquiry could have an important remedial influence on the problem of drug traffickers who jump high bond in a few districts, as well as on the problem of maintaining the good behavior of high risk release defendants.

Significant remedies under current law would be illuminated. New legislative remedies—perhaps reminiscent of the old surety system—might well be developed.

In my view, it is the erosion of the surety system through the courts—State and Federal courts—and not any defect in the Judiciary Act of 1789 or the Bail Reform Act of 1966—that has been principally responsible for weakening the public safety shield that bail provides.

While we certainly cannot turn back the clock and restore surety bail to the position it occupied in the Middle Ages or the 1700's, we may well discover a better accommodation between the values of surety bail and money bail than the one struck by the Supreme Court in 1911.

In concluding this preliminary statement, let me urge that moderation and humility accompany congressional consideration of proposals to increase public safety by repealing the historic law of bail.

Moderate reforms in the long run are less likely to produce chaos in the criminal courts than statutes that are enacted which are revolutionary and untested. There needs to be a sense of humility about rewriting history and about altering the fundamental structure of a bail decisionmaking process that has withstood the test of time for at least 700 years in England and 200 years here.

The Bail Reform Act of 1966 was not a perfect statute. You can read the testimony given by the Attorney General and the Deputy Attorney General at that time, in 1964 and 1965, and see the amount of turmoil and the amount of doubt that beset those who had developed that statute. However, it represented the best that we were able to do at the time.

It also reflected nearly a decade of detailed study of bail practices and of experiments and demonstrations in both Federal and State courts. The modest provisions of that statute, unlike S. 1554, were drafted explicitly to reflect procedures which had already been adopted voluntarily in many jurisdictions.

Money bail was retained under the Bail Reform Act despite its acknowledged flaws. The statute's enacting clause said that pretrial detention in the interest of justice and the public interest was explicitly preserved.

It was because of the modesty of those provisions and the good sense of Federal courts in administering them in the last 15 years that this committee today has no significant data to suggest that crime on bail is a serious problem in the Federal court.

The great bulk of Federal defendants who might commit crimes on release is already found among the thousands of Federal defendants held in pretrial custody every year. The pretrial service agencies created by Congress in 10 districts are making an added contribution to public safety by supervising pretrial release, as well as by helping to avoid needless detention.

I think that incremental improvements in the Federal bail system can no doubt be made. I have suggested a few and would be happy to suggest others. However, by and large, it is the Federal system that has proven reliable and safe. It is State systems, which the Senators who appeared before you today have mostly talked about, with less comprehensive statutes and weaker adminstrative and judicial structures, that are experiencing crime on bail difficulties.

In my view, a rational legislator would vote for legislation to help the States follow today's Federal right-to-bail model. The alternative to that suggestion is to mislead the public and the States by destroying a Federal system that has weathered the test of two centuries and has grown ever stronger by legislation that emerged from this subcommittee over in the past two decades.

Thank you.

Senator HATCH. Thank you, Professor Freed.

I was very impressed with the Law Review article by former Attorney General John Mitchell in which he scrupulously documented the argument for dangerousness being a consideration in granting bail from the Constitutional Convention until 1966. He pointed out that the Judiciary Act of 1789 passed by the same Congress that had approved the eighth amendment allowed no bail for capital offenses. Then he showed that at the time of that act most violent crimes, such as arson, burglary, or rape, and so forth, were capital offenses.

In other words, the record looks rather clear that violent offenses were specifically provided with no bail. How does this square with your statement that there is some kind of "right to bail prior to conviction"?

Mr. **Freed**. Attorney General Mitchell made many mistakes. In the summary of the article you have just given, he made at least two mistakes.

First, the Judiciary Act of 1789 did not forbid bail in capital cases. It explicitly vested capital bail in the discretion of Federal judges.

Let me read the very brief statute enacted by Congress in 1789:

> Upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the Supreme or circuit court or by a Justice of the Supreme Court or a judge of the district court who shall exercise their discretion therein regarding the nature and circumstances of the offense and of the evidence and the usages of law.

Senator **Hatch**. They could have had bail, but they did not have to.

Mr. **Freed**. They did not have to grant bail. It was within their discretion.

There was no suggestion whatsoever in the legislative history of that statute or in contemporary documents at that time that dangerousness was the reason for writing in that clause or was a criterion upon which judges would exercise their discretion.

There is no evidence in the case law at the time that dangerousness of defendants was a basis upon which bail would be denied in capital cases or set high in other cases.

The contemporary authority that Americans relied on when drafting statutes, constitutions, and other provisions in colonial times was Blackstone.

Blackstone explained, in a text available throughout America, that the absence of a right to bail in capital cases was due to the fact that when men were in jeopardy of their lives, it might be that no security would suffice. Therefore, it was left to the discretion of the courts to determine whether, even though someone was in jeopardy for his life, his roots in the community and the nature of the evidence made it nevertheless likely that he would appear. There is no suggestion that dangerousness was to be a criterion in bail setting.

Senator **Hatch**. That is interesting.

I would assume that you would not require bail in all cases. Even the 1966 act allowed for pretrial detention in capital cases.

Assuming that bail is allowable for capital offenses, why should the legal standard for bail depend on whether a victim of crime dies, thus making the offense a capital offense instead of just an ordinary violent felony?

In other words, I guess the question is: Should bail standards depend on whether an offense becomes a capital offense or not?

Mr. **Freed**. I think basically it should not depend on that.

In retrospect, if you examine the legislative history of the Bail Reform Act, you will not find any clear historical evidence to support the decision of the Congress, or of the Department of Justice which may have drafted the language, to insert danger to the community in the capital offense clause but not in the criteria for noncapital cases.

I think the problem of dangerousness was governed much more by the institution of the surety that I described earlier. What statute writers in the 18th century were doing, and what courts have done since, is that while they were concerned about the behavior of defendants while on release, they wished steadfastly to avoid stigmatizing any defendant by making a prejudgment as to guilt or affixing a label to the character of the defendant.

If they had authorized labeling a defendant as dangerous, they would have been imposing upon him something that could never be erased by trial. Trial does not decide whether someone is dangerous. It only decides guilt or innocence.

If legislators were going to authorize courts to find people dangerous prior to trial, there would be nothing the trial process could do about that. You could acquit a supposedly dangerous defendant, and he would go back on the streets with a certificate of acquittal and a permanent label of dangerous.

Instead, what the courts and the legislatures in the 18th and 19th centuries were doing was recognizing that danger to the community was basically safeguarded by the pledge of the personal surety.

If there was a person who would stand surety for a defendant, that would be a testimonial to the defendant's character and reliability—both to appear at trial and to behave well in the meantime.

I have found no evidence to suggest that sureties undertook without compensation, and without indemnification, to guarantee the appearance of persons without regard to whether they would commit crimes. I think sureties were just as concerned about the behavior of their clients as you or I would be if we were to stand surety today. We would stand surety for someone we felt was reliable in all respects, and not just reliable to appear but prone to commit crimes.

I think that is a major change from the surety system to the bail bond system.

We have heard many stories that bail bondsmen like a career criminal because if he pays his money and shows up in court, the fact that he continually engages in crime means that there will be more bail business.

That, to me, does not argue for the abolition of the bail bond business. It does suggest caution in using it.

I think that when courts are concerned about the behavior of a defendant while released, they should be permitted to consider conditions to assure his good behavior. They may impose conditions that will give a guarantee of good behavior.

That is why I think that the basic suggestion by Senator Chiles, Senator Bumpers, S. 1554, the Chief Justice, and the Judicial Conference of the United States that courts consider danger to the community in setting bail conditions, is a very sound proposal. I think it ought to be enacted. I think it is consistent with history. It would not have been necessary if the surety bail system had not gone out of vogue, but it is necessary because times have changed.

Senator HATCH. Thank you.

We have Senator Leahy here. He has a couple of questions. I will be back in just a few minutes.

Please go ahead, Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I want to make sure I understood the last part of your statement. I read the whole statement and heard the last part of your testimony.

Do I understand you to say that there is not a factual basis for concluding that crime while on pretrial release in Federal cases is a primary problem? Is that true in State cases? Would you elaborate on that? Did I understand you correctly?

Mr. FREED. You did, Senator.

The statistics on crime on bail that are most often quoted are data based on crime in the District of Columbia. The District of Columbia is governed by the preventive detention statute.

Those statistics demonstrate that preventive detention in the District of Columbia has not avoided the problem of crime on bail.

The reason why it has not turned the District of Columbia into chaos is because preventive detention was not the exclusive route for detention. The Nixon administration decided to have both a money bail route to detention and preventive detention.

It is for that reason that prosecutors have found it unnecessary to invoke preventive detention very often in the District of Columbia.

Nevertheless, with two routes to detention in District of Columbia, they have predicted wrong in countless cases, with the result that the statistics which have been quoted by others of crime on bail have surfaced in District of Columbia.

There are also newspaper stories and studies about crime on bail in various cities and States. I have seen to the present time no Federal reports, and no studies of any kind, that document a significant crime on bail problem in the Federal system.

There is one set of data that this committee has already reviewed. That is the experience in the ten districts that have had demonstration pretrial service agencies since 1975.

Before this subcommittee approved the proposed Pretrial Services Act of 1981, it saw that the pretrial service agencies had succeeded in cutting about in half—from about 8 or 9 percent to about 3 or 4 percent—the crime on bail rate in the districts in which those agencies served, as well as cutting the failure to appear rate.

What that suggests to me is that Congress made the right move in 1974 in setting up title II of the Speedy Trial Act with pretrial supervisory agencies, and that this committee and the Senate made the right move in deciding to enact pretrial service supervision for the entire Federal system. The House has made a mistake in holding up that bill.

The enactment of that bill would attend to any crime on bail problems that may exist, even though we do not have statistics, by providing an information and supervisory agency in every Federal court.

At the present time, there is available neither in the Attorney General's task force report, nor the speeches or statements of any Senator, nor in any other document of which I am aware, any data about crime on bail in the Federal system outside the pretrial service agency districts.

Senator LEAHY. One of the complaints we hear about is what do you do with drug traffickers who have a great deal of money and can easily make bail. In fact, they are losing money every day that they are in jail. Some can easily make bail or painlessly jump bond in the hundreds of thousands of dollars and it would really not bother them. Could a judge deny cash bail to such a person?

Mr. FREED. Senator, I believe that any judge could deny cash bail to a defendant he thought was paying for his escape. I believe that is an inherent power of any judge in any State or Federal court.

No judge needs to set a bail—whether cash, surety, or otherwise—that he thinks or knows the defendant will not abide by.

Senator LEAHY. What you are saying is that it is not the amount of the bail money then. It is just that if the court is able to make a determination that the person is going to use bail as a method of escape—whether we are talking about a crime where the judge may be setting bail at $1,000 or $100,000—he can deny cash bail.

Mr. FREED. I believe so. I believe if you were the judge, Senator, that is just what you would do. You would refuse cash bail. You would also refuse surety bail if you thought that the surety was putting up money to facilitate the escape of the defendant.

If you did not know, but you had a hunch, you would conduct an inquiry—and there have been many such inquiries in Federal courts—into the relationship between the surety and the defendant, and into the way in which the surety proposes to ensure the appearance of the defendant.

If you thought that a commercial surety or a personal surety was not going to bring the defendant back, you would be under no obligation by the law to set bail.

Senator LEAHY. Have there been cases on this question, following a determination by the court and laying out a fact pattern, that have gone up on appeal? Are there any significant cases on this where a judge has denied cash bail because he thought it was being used as a method of escape? Can you think of any offhand?

Mr. FREED. In the second circuit in the 1950's, there was a series of bail cases involving defendants in Smith Act cases. There is a series of opinions in the second circuit culminating in *Field* v. *United States,* 193 F. 2d, in which the court made it clear that a trial judge was under no obligation to accept bail from an organization whose motives were suspect as to whether it was trying to assure the appearance or guarantee the escape of a defendant.

More recently, in the first circuit, in *United States* v. *Abrahams,* the court upheld an absolute denial of bail to a defendant who had a long record of fugitivity, of jumping bail, and of not abiding by the conditions of release set by courts. The court said there were no conditions of release that this defendant has respected in the past: We can think of no bail that could be set that would guarantee his appearance. Therefore, despite the Federal statute, we are obligated to uphold the denial of bail.

Senator LEAHY. In the first circuit court, the judge made, in effect, the finding that bail would simply be an instrument of escape.

In Vermont, where I come from, we always pay a great deal of attention to the second circuit.

Mr. FREED. I believe that the first and second circuits are exactly on the right track. It is for that reason that I believe it would be fruitful for the Congress to make an inquiry into the practices of different courts that are experiencing bail jumping problems. It should examine how the problem is managed in courts that do not have bail jumping or rearrest problems, as opposed to courts that are having a high skip rate or crime on bail rate.

I think it is very important to inquire into the details of bail administration before you tamper with the structure of bail statutes.

Congress should conduct an inquiry that would bring before it, instead of law professors and Senators, U.S. attorneys and public defenders, Federal judges and magistrates, from districts that are having problems and from districts that are doing well. You should compare their practices and find out how the ones that are doing well manage to avoid bail jumping and crime on bail. You should find out what is being done by others who may not be interpreting the law in the same way. That is the way to find out how a bail system works.

Senator LEAHY. I think that is a good suggestion.

Senator HATCH. I think that is an excellent suggestion.

Mr. FREED. My basic feeling, Senators, is that if S. 1554, or anything like it to authorize findings of dangerousness and probable guilt and to impose preventive detention, passed in the Federal system, long before you got cases in the Supreme Court you would have hell to pay in the district courts.

What will a good defense lawyer do with a statute like S. 1554? A defense lawyer will challenge the prosecutor on every single element of the findings detailed in your statute. A defense lawyer will want to know if there is substantial probability of guilt. He will want to know what evidence the prosecutor has. He will demand, and many judges will grant, full disclosure by the district attorney as to what evidence he has to show substantial probability of conviction. The defense lawyer will then bring up at this stage allegations about the illegality of the evidence. He will contend that you cannot be showing substantial probability of conviction if all your evidence is illegal.

Senator LEAHY. You read that as being a lot more than showing just probable cause.

Mr. FREED. I do. I think that is clearly what is intended—whether you use the ABA standard of clear and convincing, or a test of substantial probability. It seems to me that the drafters of the bill want to make sure that the person being detained is someone who is likely to be convicted and, therefore, you are anticipating a final result.

It seems to me that the defense lawyer will also want to know what is the likely sentence in this case. What evidence does the U.S. attorney have that this is a case that will justify a prison sentence if there is a conviction? How likely is it that the prison sentence will be for incapacitation to prevent dangerousness, rather than just to punish?

There would be a determined inquiry by any good lawyer into the evidence that the U.S. attorney says he has about the prior criminal record. Prior arrests will be challenged, convictions will be challenged, the length of prior sentences, and the conduct of the person in prison or on parole, will all be asked for. In all likelihood, no prosecutor will have that information.

Then on the risk of future release, the defense lawyer will want to know what evidence there is that the person has ever misbehaved while on release, or has ever failed to appear.

Every time the prosecutor says that he does not have any information, that is a further point for a release decision on the part of the magistrate.

I think that hearings in Federal courts on bail could last days.

It is quite likely that in many cases in which defendants are now being detained on money bail, defense attorneys could under a detention statute succeed in rebutting the notion that there is a substantial probability of conviction, and proof of future dangerousness.

It is possible that a great many more people in some districts will be released under a preventive detention statute than under the money bail system that exists today.

If they are released, and when they are released, the names of the Senators who sponsored these bills might be called to account for releasing them.

Senator HATCH. That sounds like intimidation to me. [Laughter.]

Senator LEAHY. We never let that bother us around here before.

Senator HATCH. That has never bothered Senators.

I think you have made a most articulate explanation—not only that but with most everything else you have chatted about with us today. Frankly, I think you have been very helpful to the committee. We are going to have to read and reread what you have said here today.

I will keep the record open for you to provide any additional information that you care to provide as long as these hearings go on. As you see the statements of others, we would appreciate having your thoughts on that.

Our problem is that our time is up. However, there is one question I would like you to provide a written response to.

I understand you have had a chance to review the American Bar Association position on bail reform. I would like you to submit in writing your analysis of that if you would. Is that too much to ask?

I think it is important, because a number of Senators will give great weight to what the American Bar Association comes up with. They are the next witness, so you may want to, if you have the time, listen to what they have to say and maybe take a copy of their remarks.

We are very grateful to you for taking time from what we know is a busy schedule to come down and help us with this. You are an acknowledged top expert in this field, and we will certainly pay a lot of attention to what you have to say as we will to the others.

Thank you so much.

Mr. FREED. Thank you.

Senator HATCH. Our final witness today represents the American Bar Association.

Maj. Gen. Kenneth J. Hodson served during his military career as Judge Advocate General of the U.S. Army and Chief Judge of the Army's Court of Military Review.

He is currently retired from the military but not from the service of the legal profession.

He serves as vice chairman of the ABA standing committee on Association Standards.

We are honored to welcome you here today, General, and are confident that we will profit from the experience of a former judge and current leader in the legal community.

Accompanying General Hodson is Mr. Richard P. Lynch, staff director of the ABA's standing committee on Association Standards for Criminal Justice. We are also happy to have you here, Mr. Lynch, as well.

We look forward to taking your testimony now, General Hodson.

I am personally running out of time. If it is possible for you to summarize, we would appreciate it. We will certainly include your full statement in the hearing record.

## STATEMENT OF MAJ. GEN. KENNETH J. HODSON, VICE CHAIRPERSON, STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION

General HODSON. Thank you, Mr. Chairman.

If we can put my full statement, together with the attachments, in the record, I believe that in about 7 or 8 minutes I can summarize what I thought would be important to the committee.

Senator HATCH. That would be fine, and then I have a couple of questions for you.

Without objection, your complete statement with the attachments will be placed in the record at the completion of the oral testimony.

General HODSON. I believe I can summarize for the committee the significant variances between S. 1554 and the American Bar Association standards on pretrial release.

Before I begin with that comparison, I would like to mention that these standards are the result of some 18 years of work by committees in the American Bar Association. I have been associated with that project since 1963 and am now the vice chairman of the committee.

I was the chairman of the committee which developed these particular standards we are going to discuss this afternoon which have been published as chapter 10 of the ABA Standards for Criminal Justice, a four-volume set, by Little, Brown & Co. in 1980.

These black letter standards which are attached to my statement represent American Bar Association policy as voted on by the board of governors and some 360 members of the house of delegates representing over 250,000 members of the largest voluntary bar association in the United States.

There are two issues, it seems to me, where there are significant differences between S. 1554 and the ABA Standards on Pretrial Release. One of those has to do with the use of surety bonds. The other has to do with the weight which is to be given to the factor of danger to the community and how that is to be determined in deciding whether to detain the accused prior to trial.

I will take up the first issue having to do with surety bonds.

S. 1554 would abolish money bonds, which I take it would abolish all surety bonds as a means of ensuring that the accused is present at trial.

Under our pretrial release standards, the American Bar Association would abolish only compensated sureties. Although we would abolish the professional bail bondsman, we would retain the right to post money bonds of various types: for example, where appropriate a defendant could post 10 percent of the amount of the bond that had been set by the court.

Otherwise we feel that if we abolish money bonds, a number of people will be confined who would, in fact, be likely to appear were they required to deposit a $100 or $200 bond. There is no reason why such persons should be confined prior to trial in view of the overcrowded conditions of our prisons and pretrial detention centers.

With respect to the second issue—the factor of danger to the community—both S. 1554 and the ABA standards are designed to assure the presence of the accused at trial, the safety of the community, and the noninterference by the accused with the judicial process.

However, there is some variance between the provisions of S. 1554 and the means that we have adopted to achieve these objectives.

Both use a detention hearing. In S. 1554, the detention hearing is triggered by: one, the commission of certain serious offenses, such as a crime of violence, a crime involving a life or death sentence, or a drug offense involving 10 years of punishment; or, two, evidence of serious risk that he will flee or obstruct justice; or, three, he is charged with a felony and has two prior convictions of serious offenses within the past 10 years.

If any one of these three factors present and the judge determines that no conditions will assure his appearance or the safety of the community, and there is substantial probability that he has committed the offense with which he is charged, then he may be detained prior to trial. Both S. 1554 and the ABA standards provide for an expedited trial if he is detained.

The ABA policy favors pretrial release under such conditions as will assure the appearance of the accused, his noninterference with the judicial process, and the safety of the community.

As I have said, the ABA standards also provide for detention hearings to determine whether a defendant should be detained. However, our detention hearing is triggered by some different factors than those which appear in S. 1554.

Our detention hearing is triggered by any one of three events: one, the inability of the accused to make money bail prescribed; two, a violation of the conditions of his release; or, three, the commission of a new crime. After a hearing with respect to these three factors a judge may order detention if there is clear and convincing evidence that the accused obstructed justice or attempted to obstruct justice, threaten or injure witnesses, jurors, and so forth, or if he constitutes a danger to the community because:

(1) He has committed another offense while on release, or,

(2) He has violated the conditions of his release.

A third reason for detaining him is that he is likely to flee and has violated the conditions of his release or cannot satisfy the prescribed monetary conditions and that no other conditions except detention will suffice to assure his presence or the safety of the community.

Thus, in summary, Mr. Chairman, S. 1554 considers the factor of danger to the community by authorizing pretrial detention based on what offense the accused is charged, with plus, under certain circumstances, the defendants prior convictions for certain specified offenses. It also abolishes the surety bond.

Under the ABA standards there is a presumption in favor of pretrial release. We favor the full use of a pretrial service agency and the setting of strict conditions of release which may include monetary conditions where appropriate; however, our standards call for the elimination of compensated sureties. We provide for pretrial detention with an accelerated trial only on the basis of conduct which occurs after the original offense with which the defendant is charged.

There is also a difference in the burden of proof required. S. 1554 says the proof must be "substantial probability" that he committed the specified offense, but there is no evidentiary requirement for showing whether he is a danger to the community.

The ABA standards require "clear and convincing evidence" of the factors which I have outlined for you. Most importantly, if a new offense is the basis for the detention, then our standards require that the evidence be the kind that would be admissable at trial.

I might say that these second edition standards, which were adopted in 1979 by the house of delegates, contained the element of danger to the community for the first time. Our original standards, first edition 1968, did not permit detention on the basis of danger to the community.

The ABA standards are constantly evolving and are subject to study and revision as we get further evidence and as the law develops. The standards I have discussed represent the current policy of the ABA.

In closing, I would say that our standards, with one exception, are substantially the same as the standards found in the Uniform Rules of Criminal Procedure adopted by the National Conference of Commissioners on Uniform State Law.

I am available now for questions.

Senator HATCH. Thank you.

Could you tell us just briefly how the ABA prepares its policy positions? Was there much dissent to the positions which you have articulated in your testimony here today?

General HODSON. In 1963, we started to explore the development of the criminal justice standards because we were concerned with the rising crime rate, a subject which continues to be troubling.

A special committee was formed in 1964 by ABA President Lewis Powell who, as you know, is now an Associate Justice of the Supreme Court. He was careful to balance that committee so that it represents defense lawyers, prosecutors, members of the judiciary and other leading practitioners.

Those first edition standards were developed by a task force which had the same balance. They were then processed up to the committee and were sometimes revised and sent back to the task force. Then they were presented to the ABA Board of Governors for study. The board of governors then presented the standards with the board's recommendations to the house of delegates which is the association's policymaking body.

We realized that those first edition standards were getting somewhat out of date. They were almost 10 years old.

Therefore, as chairman of the Criminal Justice Standards Committee, I sought funds from the American Bar Endowment and from LEAA and we began work on a second edition. It was developed somewhat in the same way. I appointed task forces and tried to achieve a balance of defense, prosecution, judiciary, and academia under certain circumstances.

The task forces developed their revision and sent them to the standing committee. We had a good balance. We had two defenders—one Federal public defender and one practicing lawyer who practiced extensively in the defense of criminal cases. We had one prosecutor and one former police commissioner. The remainder of the committee was composed of judges—trial judges and appellate judges.

The committee also invited other organizations to contribute to our work, such as the National Association of Attorney Generals, the National District Attorneys Association, and so on. Many of them participated in our development of the second edition.

Once our committee had finished its work, we prepared a tentative draft which was passed out to all the members of the house of delegates and to all of the sections and committees of the American Bar Association which might have an interest in our work.

Thereafter, I presented our standards to the house of delegates orally, as you present a bill of legislation. There was discussion at that point.

As I recall on the pretrial release standards, the house of delegates did not amend anything. They adopted them as they were presented. In summary, that is the legislative process within the American Bar Association for the promulgation of our standards.

Senator HATCH. Thank you.

I think what we are going to do is keep the record open for you as well. Any additional remarks or submissions you would like to make to us we would be pleased to have.

You may be interested in any criticism or information put forth by Mr. Freed in this matter.

General HODSON. I thought his presentation was an excellent history.

Senator HATCH. It was excellent, and so is yours.

General HODSON. Thank you.

[The prepared statement and additional material submitted by Major General Hodson follow:]

## PREPARED STATEMENT OF MAJ. GEN. KENNETH J. HODSON

Mr. Chairman and Members of the Subcommittee on the Constitution:

My name is Kenneth J. Hodson (Major General, United States Army, retired). I am currently the Vice Chairman of the ABA's Standing Committee on Association Standards for Criminal Justice and I formerly chaired that Committee. My legal background includes service as Judge Advocate General of the United States Army and as Chief Judge of the United States Army's Court of Military Review.

I am pleased to appear today as the representative of the American Bar Association and to offer the views of the ABA on bail reform as those views are articulated within the ABA Standards for Criminal Justice.

The American Bar Association has spent considerable time and energy in the formulation of standards regarding Pretrial Release. Indeed, this subject is dealt with in a 116-page chapter (Chapter 10) of the ABA Standards for Criminal Justice, second edition, Little, Brown and Company, 1980. To assist the Committee in its deliberations I have attached the Association's black letter Standards on Pretrial Release as an appendix to this testimony.

Our thirty-one separate black letter standards on pretrial release deal with the key issues addressed in S.1554. Those key issues are:

- the elimination of surety bond;
- danger to the community as a factor in the setting of pretrial release conditions; and,
- pretrial detention.

American Bar Association policy on these issues is as follows:

### SURETY BOND

First, American Bar Association policy favors the abolition of compensated sureties. Our policy in this regard is unequivocal. In Standard 10-5.5 we state "Compensated sureties should be abolished." While we recognize that abolition may require some time, we provide that strict regulation of bail bondsmen govern this area until abolition can be achieved. Our policy favoring the abolition of bail bondsmen relates to one of the central features of S.1554 — the elimination of surety bond as a pretrial release condition. Although our Pretrial Release Standards call for the elimination of compensated sureties, we do not recommend the elimination of surety bond as a form of monetary bail. Still, our standard dealing with Release on Monetary Conditions (10-5.4) makes it clear that monetary bond is not a preferred pretrial release device. Specifically our policy states, "Monetary conditions should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court." Moreover, this standard contains an admonition that, "Monetary conditions should not be set to punish or frighten the defendant, placate public opinion, or to prevent anticipated criminal conduct."

One other salient feature of Standard 10-5.4 deserves mention and that feature concerns a prerequisite for the setting of monetary bail. In that regard we provide that, "A judicial officer should never set monetary conditions unless the officer first determines, on the basis of proffers by the the prosecution and defense, that there is probable cause to believe that the defendant has committed the charged offense."

The bill under consideration by your Committee would eliminate surety bond. In contrast, our Standards on Pretrial Release specifically provide for the continuation of money bail and of the surety bond as alternative forms of pretrial release. Under our standard, when a judicial officer determines that monetary conditions should be set, we provide that judicial officer with a least restrictive range of alternatives to follow. Thus, we provide for:

- the execution of an unsecured bond in an amount specified by the judicial officer;
- the execution of an unsecured bond accompanied by the deposit of cash or securities equal to 10 percent of the face of the bond; or,
- the execution of a bond secured by the deposit of the full amount of cash or other property or by the obligation of qualified, uncompensated sureties.

Our third alternative therefore provides for the judicial utilization of a surety bond as presently provided for under 18 U.S.C. 3146(a)(4). Still, there is one essential difference between our standard and that present provision of the United States Code — the difference lies in the fact that our standard specifies that the surety be uncompensated. While only "black letter" standards represent formal American Bar Association policy, the commentary to those black letter standards offers insight as to the background and reasoning behind our standards. In discussing monetary conditions and the utilization of both unsecured and surety bonds, the commentary to Standard 10-5.4(d) states:

> If the trial judge decides that monetary conditions are appropriate, the judge need not resort to a traditional surety bond. The judge can, for example, impose an unsecured appearance bond in a specified amount. If such a bond is imposed, the defendant need post no money or other collateral, but becomes liable for the face amount of the bond if the defendant defaults. If the judge feels that more protection against flight is necessary, the judge can require the defendant to deposit with the court 10 percent of the amount of the bond. This system, pioneered in Illinois, has been successfully utilized in many jurisdictions. Although the Supreme Court has upheld the constitutionality of retaining a portion of the 10 percent fee to pay for the administrative cost of the program, this standard requires return of the full 10 percent as long as conditions of the bond are complied with. The cost of the program is likely to be small — particularly when compared with the cost of pretrial incarceration if the defendant is not released — and the very purpose of the 10 percent bond is to permit release on monetary conditions without payment of the sort of fee that a compensated surety would require.
>
> In the vast majority of cases where monetary conditions are imposed, either an unsecured bond or a 10 percent deposit bond will be appropriate. The standard also permits imposition of a surety bond, however, for the few cases in which the assistance of a surety is useful in assuring the defendant's reappearance. [footnotes omitted]

S.1554 would eliminate the use of the surety bond and, at proposed §3142(c)(2)(M), would prohibit the execution of a money bond as a condition of release. While the American Bar Association Standards on Pretrial Release favor the use of nonmonetary conditions, they also provide for the retention of monetary conditions. Further, they provide for the use of unsecured and uncompensated surety bonds. We favor other forms of conditional release but suggest that money bail and the use of uncompensated sureties offer the judicial officer important alternatives in making pretrial release decisions.

## DANGER TO THE COMMUNITY

One of the stated purposes of S.1554 is to amend the Bail Reform Act of 1966 so as to permit consideration of danger to the community in the setting of pretrial release conditions. An examination of the American Bar

Association's Standards on Pretrial Release will reveal that this Association has paid close attention to community safety in the drafting and adoption of its standards. Indeed, community safety and crime prevention were central factors in the Association's consideration of pretrial release issues. For example, Standard 10-1.3(b) states that "constitutionally permissible nonmonetary conditions should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication." Next, Standard 10-4.4 provides for a pre-first-appearance inquiry to assist the court in setting release conditions. We specifically state that the agency conducting such an inquiry should explore, inter alia, the defendant's character and reputation, the defendant's prior criminal record and any facts indicating the possibility of violations of the law if the defendant is released without restrictions. Standard 10-5.1 favors release on a defendant's own recognizance; however, we indicate that the presumption in favor of such release may be overcome by a finding that there is substantial risk of nonappearance or a need for additional release conditions. In Standard 10-5.2(e) we provide that a judicial officer may "impose any other reasonable restriction designed to ensure the defendant's appearance, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice." Moreover, at Standard 10-5.3 we indicate that every jurisdiction should provide a pretrial service agency or similar facility to monitor and assist defendants prior to trial. An important function of such pretrial service agencies is to "promptly inform the court of all apparent violations of pretrial release conditions. . ."

Like the American Bar Association Standards on Pretrial Release, S.1554 would require a judicial officer to order the release of a defendant on that defendant's personal recognizance unless the judicial officer determines that such a release will not reasonably ensure the defendant's appearance or will endanger the safety of any person or the community. And it is at this point that the provisions of S.1554 begin to differ from the American Bar Association's Standards on Pretrial Release. Under proposed §3142(a) a judicial officer has four choices for the disposition of a pretrial defendant.

That judicial officer may:

- release the defendant on personal recognizance;
- release the defendant on a condition or combination of conditions;
- temporarily detain the defendant to permit revocation of conditional release; or,
- order the full pretrial detention of that defendant.

While the operating philosophy of the first two alternatives is in general conformity with the thrust of the ABA Standards, alternatives three and four merit further discussion. The third alternative relates to temporary detention based upon a judicial officer's finding that the defendant was, at the time of the release hearing, on:

- release pending trial for a federal, state or local felony;
- release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence for any federal, state or local offense; or,
- probation or parole for any federal, state or local offense;

and, that no condition or combination of conditions will reasonably assure the appearance of the defendant and the safety of any other person and the community.

A judicial officer making such a finding must order the defendant's detention for a period of not more than ten days. The ABA has a number of standards which relate to the provisions of proposed §3142(d). First, Standard 10-4.4 provides that the inquiring agency should provide the judicial officer with information regarding the defendant's prior criminal record. Next, Standard 10-5.7 deals with the violation of conditions on release and provides for the issuance of a warrant directing the defendant's arrest for such violations. This standard provides that after a defendant is taken into custody for such violations the judicial officer shall set new conditions for release or shall schedule a full pretrial detention hearing within five calendar days. The defendant may be kept in custody pending that detention hearing in those cases where there is a cognizable, probable cause to believe that the defendant has committed a crime while on release pending adjudication of a prior charge. Thus, while our standards do not speak directly to the provisions of proposed §3142(d), we do have related Association policies. Finally, in each case under §3142(d) it would seem that the triggering factors would, in any event, constitute appropriate cause for a procedurally constitutional revocation of pretrial release, probation or parole. The principal difference between S.1554 and the American Bar Association's Standards on Pretrial Release involves the use of pretrial detention.

## PRETRIAL DETENTION

While the central thrust of the Association's 31 separate black letter Standards on Pretrial Release favors release of persons accused of crime pending adjudication, our standards also recognize that "some restraints on the defendant's liberty may be crucial to allow the process to go forward. . ."

ABA Standard 10-5.9 deals specifically with pretrial detention and it provides a procedure for a pretrial detention hearing which may be triggered by:

(a) a judicial determination that monetary bail is necessary, coupled with defendant's failure to satisfy that condition;

(b) a judicial determination that defendant has willfully violated a condition of release;

(c) a judicial determination that there is probable cause to believe defendant has committed a crime while on pretrial release; or,

(d) by formal complaint from a prosecutor, law enforcement officer or representative of the pretrial release agency that defendant is likely to flee, threaten or intimidate witnesses, or constitutes a danger to the community as evidenced by (b) or (c) above.

The fourth triggering event set forth above relates to a defendant's "dangerousness." This Association is mindful of the fact that some defendants on bail pending trial do commit additional offenses and we share the concern over this problem expressed by both law enforcement agencies and the public. As lawyers we know that the denial of bail is a serious step which materially decreases a defendant's ability to assist counsel in preparing an adequate defense. In recognition of that fact Standard 10-5.2 provides for the setting of "any reasonable restriction designed to ensure . . . the safety of the community." The standards provide that violation of those conditions of release can subject the defendant to arrest and require either the setting of new conditions or the scheduling of a pretrial detention hearing within five calendar days (Standard 10-5.7). The standards also provide that where probable cause is shown to believe a released defendant has committed a new crime, a pretrial detention hearing should be scheduled within five calendar days (Standard 10-5.8). Finally, the standards provide for full pretrial detention hearings (Standard 10-5.9) and for the accelerated trial of detained defendants (Standard 10-5.10).

Notwithstanding the recent decision by the D.C. Court of Appeals which upheld the District of Columbia's pretrial detention statute (U.S. v. Edwards, D.C. Court of Appeals No. 80-294 and Edwards v. U.S., D.C. Court of Appeals No. 80-401, decided May 8, 1981), the constitutionality of preventive detention remains to be tested by the Supreme Court.

Our standards, Mr. Chairman, provide a detailed mechanism for triggering a pretrial detention hearing based upon present conduct and not upon a generalized prediction of dangerousness. Under Standard 10-5.9 a defendant may be determined to consititute a danger to the community and may be detained because:

- the defendant has committed a criminal offense since release; or,
- the defendant has violated conditions of release designed to protect the community and no additional conditions of release are sufficient to protect the community.

American Bar Association policy favors the release of defendants pending the determination of guilt or innocence. Notwithstanding that overriding predilection for release, our standards recognize and provide for pretrial detention where a defendant's alleged commission of a new crime or a defendant's violation of release conditions require swift judicial action to ensure the integrity of the criminal justice process. We require that the detention decision be based solely upon evidence adduced at a formal pretrial detention hearing. Further, we require that such evidence be "clear and convincing."

Mr. Chairman, I ought to point out that the American Bar Association's Standard on Pretrial Detention (10-5.9) represents a relatively recent change in American Bar Association policy. The first edition of our Pretrial Release Standards (1968) contained no provision for pretrial detention. In February, 1979 the ABA's House of Delegates approved the addition of a pretrial detention standard. This new standard requires a judicial officer to convene a pretrial detention hearing when a defendant fails to satisfy the conditions of monetary bond, when a defendant has violated a condition of release, when there is probable cause to believe that a defendant on release has committed a crime, or when an appropriate official by verified complaint alleges that a released defendant is likely to flee, threaten or intimidate witnesses or court personnel, or constitutes a danger to the community. I have already alluded to the factors which determine whether or nor a defendant constitutes a danger to the community under Standard 10-5.9. In the main those factors are ones which occur subsequent to initial pretrial release. Thus, a defendant who commits a new offense or a defendant who violates conditions of initial release would be subject to a pretrial detention hearing because of acts committed while on release. In contrast, S.1554 would seem to allow pretrial detention based more heavily upon a defendant's past conduct and therefore upon a prediction as to the defendant's likely future conduct. Because of our concerns over general predictions of future dangerousness, we have attempted to limit our pretrial detention standard to cover cases in which a pretrial detention hearing is triggered by the defendant's violation of release conditions. Although this is a most difficult and troubling area for lawyers and the community, I think you will find that the ABA Standards on Pretrial Release contain a scrupulous regard for the safety of the community. In a general sense our Pretrial Release Standards favor the release of charged defendants and suggest that those defendants who qualify for release should be most carefully monitored by effective pretrial service agencies. Our standards also call for prompt reporting of release violations and for equally prompt judicial action upon the receipt of such reports. Then, and only then, do our standards fully support the concept of pretrial detention.

The task of finding solutions to the social blight of crime and delinquency is not an easy one. For 18 years the American Bar Association has labored to produce standards which will improve the fairness and the effectiveness of our criminal justice system. The 469 black letter standards contained within the ABA Standards for Criminal Justice represent the views of the world's largest volunteer professional association. These standards embody our legal learning, our experience and our aspirations for a system of criminal justice which truly protects the public while dealing fairly and expeditiously with those charged with crimes. I commend the ABA Standards for Criminal Justice to you and your colleagues, Mr. Chairman, with the hope that they will assist you in the exercise of your important responsibilities.

In summary, Mr. Chairman, we support the elimination of compensated sureties but feel that limited use of money bond and of uncompensated sureties continue to represent useful judicial alternatives. We support the concept of including consideration of community safety as a necessary element in the formulation of release conditions and, where violations of those conditions occur or when pretrial defendants commit new offenses we support the prompt convening of procedurally adequate pretrial detention hearings. We provide for pretrial detention in limited and carefully controlled circumstances but we do not support pretrial detention based solely upon a defendant's past conduct or upon a general prediction of future dangerousness.

# APPENDIX

## AMERICAN BAR ASSOCIATION
## STANDARDS FOR CRIMINAL JUSTICE

BLACK LETTER STANDARDS
ON
PRETRIAL RELEASE

AND

BLACK LETTER STANDARD
21-2.5
ON
CRIMINAL APPEALS

# CHAPTER 10
# PRETRIAL RELEASE

## PART I. GENERAL PRINCIPLES

### Standard 10-1.1 Policy favoring release

The law favors the release of defendants pending determination of guilt or innocence. Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not been judicially established to economic and psychological hardship, interferes with their ability to defend themselves, and, in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents a major public expense.

### Standard 10-1.2. Definitions

(a) Citation: a written order issued by a law enforcement officer requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time. The form should require the signature of the person to whom it is issued.

(b) Summons: an order issued by a court requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time.

(c) Release on own recognizance (sometimes referred to as "personal recognizance"): the release of a defendant without bail but upon an order to appear at all appropriate times, to refrain from criminal law violations, and to refrain from threatening or otherwise interfering with potential witnesses. Release on own recognizance is not inconsistent with the imposition of other nonmonetary conditions reasonably necessary to secure the presence of the accused and to protect the safety of the community.

(d) Release on monetary conditions: the release of a defendant upon the execution of a bond, with or without sureties, which may or may not be secured by the pledge of money or property.

(e) First appearance: that proceeding at which a defendant initially is taken before a judicial officer after arrest.

### Standard 10-1.3. Conditions on release

(a) Each jurisdiction should adopt procedures designed to maximize the number of defendants released on their own recognizance. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case. Methods for providing the appropriate judicial officer with a reliable statement of the facts relevant to the release decision should be developed.

(b) Constitutionally permissible nonmonetary conditions should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication.

(c) Release on monetary conditions should be reduced to minimal proportions. It should be required only in cases in which no other conditions will reasonably ensure the defendant's appearance. When monetary conditions are imposed, bail should be set at the lowest level necessary to ensure the defendant's reappearance and with regard for the defendant's financial ability to post bond. Compensated sureties should be abolished, and a defendant held on financial conditions should be released upon the deposit of cash or securities of not less than ten percent of the amount of the bail, to be returned, at the conclusion of the case.

### Standard 10-1.4. Intentional failure to appear

Intentional failure to appear in court without just cause after pretrial release should be made a criminal offense. Each jurisdiction should establish an adequate apprehension unit designed to apprehend defendants who have failed to appear or who have violated conditions of their release.

## PART II. RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

### Standard 10-2.1. Policy favoring issuance of citations

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

### Standard 10-2.2. Mandatory issuance of citation

(a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a misdemeanor should be required to issue a citation in lieu of arrest or, if an arrest has been made, to issue a citation in lieu of taking the accused to the police station or to court.

(b) Except as provided in paragraph (c), when an arrested person has been taken to a police station and a decision has been made to charge the person with a misdemeanor, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The requirement to issue a citation set forth in paragraphs (a) and (b) need not apply and the defendant may be detained:

(i) when an accused subject to lawful arrest fails to identify himself or herself satisfactorily;

(ii) when an accused refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission of guilt and represents only the accused's promise to appear;

(iii) when an otherwise lawful arrest or detention is necessary to prevent imminent bodily harm to the accused or to another;

(iv) when the accused has no ties to the jurisdiction reasonably sufficient to assure accused's appearance and there is a substantial likelihood that the accused will refuse to respond to a citation; or

(v) when the accused previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation.

(d) When an officer fails to issue a citation pursuant to paragraph (c), the officer should be required to indicate the reasons in writing.

### Standard 10-2.3. Permissive authority to issue citations in all cases

(a) A law enforcement officer acting without a warrant who has probable cause to believe that a person has committed any offense for which the officer could legally arrest the person should be authorized by law to issue a citation in lieu of arrest or continued custody. The officer should be strongly encouraged to do so unless one or more of the circumstances described in standard 10-2.2(c)(i)-(v) are present. The statute authorizing such action should require that the appropriate judicial or administrative agency promulgate detailed rules of procedure governing the exercise of authority to issue citations.

(b) Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is patently necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

### Standard 10-2.4. Lawful searches

When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.

### Standard 10-2.5. Persons in need of care

Notwithstanding that a citation is issued, a law enforcement officer should be authorized to take a cited person to an appropriate medical facility if the person appears mentally or physically unable to care for himself or herself.

## PART III. ISSUANCE OF SUMMONS IN LIEU OF ARREST WARRANT

### Standard 10-3.1. Authority to issue summons

All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody. Judicial officers should liberally utilize this authority unless a warrant is necessary to prevent flight, to prevent imminent bodily harm to the defendant or another, or to subject a defendant to the jurisdiction of the court when the defendant's whereabouts are unknown. If a judicial officer issues a summons rather than an arrest warrant in connection with an offense, no law enforcement officer may arrest the accused for that offense without obtaining a warrant.

### Standard 10-3.2. Mandatory issuance of summons

The issuance of a summons rather than an arrest warrant should be mandatory in all misdemeanor cases unless the judicial officer finds that:

(a) the defendant previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation;

(b) the defendant has no ties to the community reasonably sufficient to assure appearance and there is a substantial likelihood that the defendant will refuse to respond to a summons;

(c) the whereabouts of the defendant are unknown and the issuance of an arrest warrant is a necessary step in order to subject the defendant to the jurisdiction of the court; or

(d) an otherwise lawful arrest is necessary to prevent imminent bodily harm to the defendant or to another.

### Standard 10-3.3. Application for an arrest warrant or summons

(a) At the time of the presentation of an application for an arrest warrant or summons, the judicial officer should require the applicant to produce such information as reasonable investigation would reveal concerning the defendant's:

(i) residence,

(ii) employment,

(iii) family relationships,

(iv) past history of response to legal process, and

(v) past criminal record.

(b) The judicial officer should ordinarily issue a summons in lieu of an arrest warrant when the prosecuting attorney so requests.

(c) In any case in which the judicial officer issues a warrant, the officer shall state the reasons in writing or on the record for failing to issue a summons.

### Standard 10-3.4. Service of summons

Statutes prescribing the methods of service of criminal process should include authority to serve a summons by certified mail.

## PART IV. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT

### Standard 10-4.1. Prompt first appearance

Unless the accused is released on citation or in some other lawful manner, the accused should be taken before a judicial officer without unnecessary delay. Except during nighttime hours, every accused should be presented no later than [six] hours after arrest. Judicial officers should be readily available to conduct first appearances within the time limits established by this standard. Under no circumstances should the accused's first appearance be delayed in order to conduct in-custody interrogation or other in-custody investigation. An accused who is not promptly presented shall be entitled to immediate release.

### Standard 10-4.2. Nature of first appearance

(a) The first appearance before a judicial officer should take place in such physical surroundings and with such unhurried and quiet dignity as are appropriate to the administration of justice. Each case should receive individual treatment, and decisions should be based on the particular facts of that case. The proceedings should be conducted in clear and easily understandable language calculated to advise the defendant effectively of the defendant's rights and of the actions to be taken against him or her. The appearance should be conducted in such a way that other interested persons present may be informed of the proceedings.

(b) Upon the accused's first appearance, the judicial officer should inform the accused of the charge and the maximum possible penalty upon conviction. The judicial officer should also provide the accused with a copy of the charging document and take such steps as are reasonably necessary to ensure that the defendant is adequately advised of the following:

(i) that the defendant is not required to say anything, and that anything the defendant says may be used against him or her;

(ii) that, if the defendant is as yet unrepresented, the defendant has a right to counsel and, if the defendant is financially unable to afford counsel and the nature of the charges so require, counsel forthwith will be appointed;

(iii) that the defendant has a right to communicate with counsel, family, and friends, and that, if necessary, reasonable means will be provided to enable defendant to do so; and

(iv) that, where applicable, defendant has a right to a preliminary examination.

(c) An appropriate record of the proceedings should be made. The defendant also should be advised of the nature and approximate schedule of all further proceedings to be taken in the case.

(d) No further steps in the proceedings should be taken until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(e) In every case not finally disposed of at first appearance, and except in those cases in which the prosecuting attorney has stipulated that the defendant may be released on his or her own recognizance, the judicial officer should decide in accordance with the standards hereinafter set forth the question of the defendant's pretrial release.

(f) It should be the policy of prosecuting attorneys to encourage the release of defendants upon their own recognizance in compliance with these standards. Special efforts should be made to enter into stipulation to that effect in order to avoid unnecessary pretrial release inquiries and to promote efficiency in the administration of justice.

## Standard 10-4.3. Release of defendants without special inquiry

Defendants charged with misdemeanors or appearing pursuant to a summons or citation should be released by a judicial officer on their own recognizance without the special inquiry prescribed hereafter, unless a law enforcement official gives notice to the judicial officer that he or she intends to oppose such release. If such a notice is given, the inquiry should be conducted. No defendant appearing pursuant to a citation or summons should be detained unless the judicial officer states in writing new or newly discovered information unavailable to the official issuing the summons or citation which justifies more stringent conditions of release.

## Standard 10-4.4. Pre-first-appearance inquiry

(a) In all cases in which the defendant is in custody and charged with a felony, an inquiry into the facts relevant to pretrial release should be conducted prior to or contemporaneous with the defendant's first appearance unless the prosecution advises that it does not oppose release on recognizance or the right to such an inquiry is waived by the defendant after consultation with counsel.

(b) The inquiry should be undertaken by the pretrial services agency established pursuant to standard 10-5.3.

(c) In appropriate cases, the inquiry may be conducted in open court. Inquiry of the defendant should carefully exclude questions concerning the details of the current charge.

(d) The inquiry should be exploratory and should include such factors as:

(i) defendant's employment status and history and the assets available to defendant to meet any monetary condition upon release;

(ii) the nature and extent of defendant's family relationships;

(iii) defendant's past and present residence;

(iv) defendant's character and reputation;

(v) names of persons who agree to assist defendant in attending court at the proper time;

(vi) defendant's prior criminal record, if any, and, if previously released pending trial, whether defendant appeared as required;

(vii) any facts indicating the possibility of violations of law if defendant is released without restrictions; and

(viii) any facts tending to indicate that defendant has strong ties to the community and is not likely to flee the jurisdiction.

(e) The inquiring agency should make recommendations to the judicial officer concerning the conditions, if any, which should be imposed on the defendant's release. The agency should formulate detailed guidelines to be utilized in making these recommendations, and, whenever possible, the recommendations should be supported by objective factors contained in the guidelines. The results of the inquiry and the recommendations should be made known to participants in the first appearance as soon as possible.

## PART V. THE RELEASE DECISION

### Standard 10-5.1. Release on defendant's own recognizance

(a) It should be presumed that the defendant is entitled to be released on his or her own recognizance. The presumption may be overcome by a finding that there is a substantial risk of nonappearance or a need for additional conditions as provided in standard 10-5.2.

(b) In determining whether there is a substantial risk of nonappearance, the judicial officer should take into account the following factors concerning the defendant:

(i) the length of residence in the community;

(ii) employment status and history;

(iii) family and relationships;

(iv) reputation, character, and mental condition;

(v) prior criminal record, including any record of appearance or nonappearance while on personal recognizance or bail;

(vi) the identity of responsible members of the community who would vouch for the defendant's reliability;

(vii) the nature of the offense presently charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of nonappearance; and

(viii) any other factors pertaining to the defendant's ties to the community or bearing on the risk of intentional failure to appear.

(c) In evaluating these and any other factors, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge.

(d) In the event the judicial officer determines that release on personal recognizance is unwarranted, the officer should include in the record a statement of the reasons for this decision.

### Standard 10-5.2. Conditions on release

Upon a finding that release on the defendant's own recognizance is unwarranted, the judicial officer should impose the least onerous of the following conditions necessary to assure the defendant's appearance in court, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice:

(a) release the defendant to the custody of a pretrial services agency established pursuant to standard 10-5.3;

(b) release the defendant into the care of some other qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court. Such supervisor should be expected to maintain close contact with the defendant, to assist the defendant in making arrangements to appear in court, and, where appropriate, to accompany the defendant to court. The supervisor should not be required to be financially responsible for the defendant, nor to forfeit money in the event the defendant fails to appear in court;

(c) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant, including prohibitions against the defendant approaching or communicating with particular persons or classes of persons and going to certain geographical areas or premises;

(d) prohibit the defendant from possessing any dangerous weapons, engaging in certain described activities, or using intoxicating liquors or certain drugs; or

(e) impose any other reasonable restriction designed to assure the defendant's appearance, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice.

## Standard 10-5.3. Pretrial services agency

Every jurisdiction should provide a pretrial services agency or similar facility to monitor and assist defendants released prior to trial. The agency should:

(a) conduct pre-first-appearance inquiries pursuant to standard 10-4.4;

(b) provide intensive supervision for persons released into its custody pursuant to standard 10-5.2(a);

(c) operate or contract for the operation of appropriate facilities for the custody or care of persons released, including, but not limited to, residential half-way houses, addict and alcoholic treatment centers, and counseling services;

(d) promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released to its custody and under its supervision and recommend appropriate modifications of release conditions;

(e) supervise other agencies which serve as custodians for released defendants and advise the court as to the eligibility, availability, and capacity of such agencies;

(f) assist persons released prior to trial in securing any necessary employment and medical, legal, or social services;

(g) remind persons released prior to trial of their court dates and assist them in getting to court.

## Standard 10-5.4. Release on monetary conditions

(a) Monetary conditions should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court.

(b) The sole purpose of monetary conditions is to assure the defendant's appearance. Monetary conditions should not be set to punish or frighten the defendant, to placate public opinion, or to prevent anticipated criminal conduct.

(c) A judicial officer should never set monetary conditions unless the officer first determines, on the basis of proffers by the prosecution and defense, that there is probable cause to believe that the defendant has committed the charged offense.

(d) Upon finding that a monetary condition should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to 10 percent of the face amount of the bond. The deposit should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

(e) Monetary conditions should be set no higher than that amount reasonably required to assure the defendant's appearance in court. In setting the amount of bail, the judicial officer should take into account the defendant's financial ability to post the bond. The judicial officer should also take into account all facts relevant to the risk of willful nonappearance, including:

(i) the length and character of the defendant's residence in the community;

(ii) defendant's employment status and history;

(iii) defendant's family ties and relationships;

(iv) defendant's reputation, character, and mental condition;

(v) defendant's past history of response to legal process;

(vi) defendant's prior criminal record;

(vii) the identity of responsible members of the community who would vouch for defendant's reliability;

(viii) the nature of the current charge, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and

(ix) any other factors indicating defendant's roots in the community.

(f) Monetary conditions should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge but should be the result of an individualized decision, taking into account the special circumstances of each defendant.

(g) Monetary conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schecule.

## Standard 10-5.5. Compensated sureties

Compensated sureties should be abolished. Pending abolition, they should be licensed and carefully regulated. The amount which a compensated surety can charge for writing a bond should be set by law. No licensed surety should be permitted to reject an applicant willing to pay the statutory fee or to insist upon additional collateral other than specified by law.

## Standard 10-5.6. Review of release decision

(a) Upon motion by either the defense or the prosecution alleging changed or additional circumstances, the court should promptly reexamine the release decision.

(b) Frequent and periodic reports should be made to the court as to each defendant who has failed to secure release within [two weeks] of arrest. The prosecuting attorney should be required to advise the court of the status of the case and why the defendant has not been released or tried.

## Standard 10-5.7. Violation of conditions of release

(a) Upon sworn affidavit by the prosecuting attorney, a law enforcement officer, a representative of the pretrial services agency, or a licensed surety establishing probable cause to believe that a defendant has intentionally violated the conditions of release, a judicial officer may issue a warrant directing that the defendant be arrested and taken forthwith before the judicial officer setting the conditions of release. After the defendant is taken into custody, the judicial officer shall either:

(i) set new or additional conditions of release, or

(ii) schedule a pretrial detention hearing within five calendar days pursuant to standard 10-5.9.

(b) A law enforcement officer having probable cause to believe that a released defendant has violated the conditions of release should be authorized, when it would be impracticable to secure a warrant, to arrest the defendant and take him or her forthwith before the judicial officer setting the condition of release.

## Standard 10-5.8. Commission of crime while awaiting trial

When it is shown that a competent court or grand jury has found probable cause to believe that a defendant has committed a crime while released pending adjudication of a prior charge, or when the prosecution, a law enforcement officer, a representative of the pretrial release agency, or a surety presents the judicial officer with a sworn affidavit establishing probable cause to believe that the defendant committed such a crime, the judicial officer may issue a warrant directing that the defendant be arrested and taken before the judicial officer setting the conditions of release. After the defendant is taken into custody, the judicial officer should schedule a pretrial detention hearing pursuant to standard 10-5.9 within five calendar days.

## Standard 10-5.9. Pretrial detention

(a) A judicial officer shall convene a pretrial detention hearing whenever:

(i) a defendant has been detained for five days pursuant to standards 10-5.4, 10-5.7(a)(ii), or 10-5.8, or

(ii) the prosecutor, a law enforcement officer, or a representative of the pretrial services agency alleges, in a verified complaint, that a released defendant is likely to flee, threaten or intimidate witnesses or court personnel, or constitute a danger to the community.

(b) At the conclusion of the pretrial detention hearing, the judicial officer should issue an order of detention if the officer finds in writing by clear and convincing evidence that:

(i) the defendant, for the purpose of interfering with or obstructing or attempting to interfere with or obstruct justice, has threatened, injured, or intimidated or attempted to threaten, injure, or intimidate any prospective witness, juror, prosecutor, or court officer, or:

(ii) the defendant constitutes a danger to the community because:

(A) the defendant has committed a criminal offense since release, or

(B) the defendant has violated conditions of release designed to protect the community and no additional conditions of release are sufficient to protect the safety of the community; or

(iii) the defendant is likely to flee and:

(A) the defendant is presently detained because he or she cannot satisfy monetary conditions imposed pursuant to standard 10-5.4 and no less stringent conditions will reasonably assure defendant's reappearance, or

(B) the defendant has violated conditions of release designed to assure his or her presence at trial and no additional nonmonetary conditions or monetary conditions which the defendant can meet are reasonably likely to assure the defendant's presence at trial.

(c) The judicial officer shall not issue an order of detention unless the officer first finds that the safety of the community, the integrity of the judicial process, or the defendant's reappearance cannot be reasonably assured by advancing the date of trial or by imposing additional conditions on release. In lieu of an order of detention, the judicial officer may enter an order advancing the date of trial or imposing additional conditions on release.

(d) Notwithstanding the order of detention, any defendant detained pursuant to standard 10-5.9(b)(iii)(A) shall be released whenever the defendant meets the original monetary conditions set upon release.

(e) Pretrial detention hearings shall meet the following criteria:

(i) The pretrial hearing should be held within five days of the events outlined in standards 10-5.4, 10-5.7(a)(ii), 10-5.8, or 10-5.9(a)(ii). No continuance of the pretrial detention hearing should be permitted except with the consent of the defendant in hearings held pursuant to standards 10-5.4, 10-5.7(a)(ii), and 10-5.8 or the consent of the prosecutor in hearings held pursuant to standard 10-5.9(a)(ii).

(ii) In order to provide adequate information to both sides in their preparation for a pretrial detention hearing, discovery prior to the hearing should be as full and free as possible, consistent with the standards in the chapter on Discovery and Procedure Before Trial.

(iii) The burden of going forward at the pretrial detention hearing should be on the prosecution. The defendant should be entitled to be represented by counsel, to present witnesses and evidence on his or her own behalf, and to cross-examine witnesses testifying against him or her.

(iv) No testimony of a defendant given during a pretrial detention hearing should be admissible against the defendant in any other judicial proceedings other than prosecutions against the defendant for perjury.

(v) Rules respecting the presentation and admissibility of evidence at the pretrial detention hearing should be the same as those governing other preliminary proceedings, except that when the defendant's detention is premised upon the commission of a new criminal offense, the rules respecting the presentation and admissibility of evidence should be the same as those governing criminal trials.

(f) A pretrial detention order should:

(i) be based solely upon evidence adduced at the pretrial detention hearing;

(ii) be in writing;

(iii) be entered within twenty-four hours of the conclusion of the hearing;

(iv) include the findings of fact and conclusions of law of the judicial officer with respect to the reasons for the order of detention and the reasons why the integrity of the judicial process, the safety of the community, and the presence of the defendant cannot be reasonably assured by advancing the date of trial or imposing additional conditions on release; and

(v) include the date by which the detention must terminate pursuant to standard 10-5.10.

(g) Every pretrial detention order should be subject to expedited appellate review.

## Standard 10-5.10. Accelerated trial for detained defendants

Every jurisdiction should adopt, by statute or court rule, a time limitation within which the defendant in custody pursuant to standard 10-5.9 must be tried which is shorter than the limitation applicable to defendants at liberty pending trial. The failure to try a defendant held in custody within the prescribed period should result in the defendant's immediate release from custody pending trial.

## Standard 10-5.11. Trial

The fact that a defendant has been detained pending trial should not be allowed to prejudice the defendant at the time of trial or sentencing. Care should be taken to ensure that the trial jury is unaware of the defendant's detention.

## Standard 10-5.12. Credit for pretrial detention

Every convicted defendant should be given credit, against both a maximum and minimum term, for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed, or as a result of the underlying conduct on which such a charge is based.

## Standard 10-5.13. Release to prepare for trial

Upon a showing by a defendant detained pursuant to standard 10-5.9 that his or her temporary release is necessary in order adequately to prepare the defense, the judicial officer should order defendant's release in the custody of the defense attorney or, when this is inadequate to assure defendant's presence at trial and the safety of the community, a law enforcement officer. No such release shall be for a period longer than six consecutive hours.

## Standard 10-5.14. Treatment of defendants detained pending trial

A defendant who is detained prior to trial should be confined in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending appeal, and any restrictions on the rights the defendant would have as a free citizen should be as minimal as institutional security and order require. The rights and privileges of defendants detained pretrial in no instance should be more restricted than those of convicted defendants who are detained.

# CHAPTER 21
# CRIMINAL APPEALS

## PART II. TRANSITION FROM TRIAL COURT TO APPELLATE COURT

### Standard 21-2.5. Release pending appeal; stay of execution

(a) When an appeal has been instituted by a convicted defendant after a sentence of imprisonment has been imposed, the question of the appellant's custody pending final decision on appeal should be reviewed and a fresh determination made by the trial court. The burden of seeking a stay of execution and release may properly be placed on the appellant. The decision of the trial court should be subject to redetermination by an appellate judge or court on the initiative of either the prosecution or the defense.

(b) Release should not be granted if the court finds that there is substantial risk that the appellant will not appear to answer the judgment following conclusion of the appellate proceedings, or that the appellant is likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice In deciding whether to release a convicted defendant pending appeal, the trial court should also take into account the nature of the crime and the length of sentence imposed, together with factors relevant to pretrial release.

(c) Execution of a death sentence should be stayed automatically when an appeal is instituted.

(d) Dilatory prosecution of an appeal through acts or omissions of appellant or appellant's counsel should be ground for termination of the release of appellant pending appeal.

(e) In a jurisdiction with an intermediate appellate court, when review in the highest court is sought by a defendant-appellant, the question of custody pending action by the highest court may be redetermined by the intermediate appellate court or a judge thereof. When review is sought by the prosecution, standards relevant to custody of defendants pending prosecution appeal from trial court decisions should be applied. Decisions concerning custody by the intermediate appellate court or judge thereof should be subject to review by the highest court.

# BAIL REFORM

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## WEDNESDAY, OCTOBER 21, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 1:35 p.m., in room 6226, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Hatch.

Staff present: Randy Rader, counsel; and Claire Greif, clerk.

## OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator **Hatch**. Perhaps the best way to introduce our second hearing on the subject of bail reform is to briefly recount some of the evidence that the current system is not functioning properly.

A 1978 study performed in the District of Columbia found that 13 percent of felony suspects released after arrest were apprehended for another crime while they were free on bail. A 1981 study of an eight-State area disclosed that one out of six suspects were rearrested during their pretrial freedom. Almost one-third of these offending suspects free on bail were rearrested more than once, some as many as four times, before their original cases were settled.

Although these reliable studies suggest that communities may actually be endangered by inadequate protections in bail proceedings, current law prevents a Federal judge from considering risks to the community when setting conditions for pretrial release. Under the Bail Reform Act of 1966, the only issue a Federal judge may consider is what conditions will reasonably assure that the suspect will appear for trial.

The failure of Federal criminal law to allow consideration of dangerousness in bail proceedings has caused several arbitrary results in practice. For instance, former U.S. Attorney for the District of Columbia, Earl J. Silbert, states:

> The utter absurdity of this [law] is best demonstrated by the argument defense lawyers routinely make and judges too often accept: The defendant should be released because his extensive record of criminal arrests and convictions for serious crimes without any charge of flight is persuasive proof that he appears in court as required. The logical extension of this argument is that the more crimes a defendant has committed, the stronger his argument for release.

To see that community safety is considered in pretrial release decisions, I have joined several of my colleagues in sponsoring S.

1554, the primary object of discussion for our hearing today. From a judge's perspective, Harold Greene testified before this committee over 10 years ago, when he was Chief Judge of the District's Court of General Sessions, about the inadequacies of the 1966 Bail Reform Act's standards:

> Under the present law, a defendant with steady roots in the community . . . must be released on personal recognizance with minimal conditions or no conditions at all, even if he is charged with a crime as serious as armed robbery, and even if he happens to have a record of five or six prior serious felony convictions. By contrast, a defendant from out of town without a prior record who is charged with an offense as minor as an attempted petit larceny is technically required to be subjected to the most severe conditions, including high money bail. This kind of disparity only makes sense if the danger of flight or nonappearance in court is deemed to constitute the sole valid criterion in the setting of bail. I believe that, to the contrary, when bail is set, the protection of the community from potentially dangerous criminals should be given equal weight with the danger of nonappearance. [Hearing of this committee, 1969.]

No wonder many judges laboring under this law admit using "extreme rationalizations in circumventing" the current policy. For instance, Judge Tim Murphy, formerly of the Court of General Sessions, testified before a House committee that "you cannot expect judges to follow the letter of a law that requires them to turn many dangerous criminals loose day after day."

In February of this year, the Chief Justice discussed the "startling amount of crime committed by persons on release pending trial" and urged that judges be given greater discretion to prevent this threat. Finally, in our hearings last month the American Bar Association and the National District Attorneys Association gave their support to incorporating some consideration of community safety into our Federal bail laws.

S. 1554 has clearly received widespread support for its provisions adding "safety of any person and the community" to the current standards for setting bail. This is not, however, the only provision of S. 1554. S. 1554 also allows the detention for up to 10 days of a suspect arrested for a crime who is already subject to bail conditions in another jurisdiction. This 10-day detention will allow the authorities in the other jurisdiction to take appropriate action to revoke his prior bail.

S. 1554 also sets a more stringent standard for post-conviction releases. Under current law, a judge must release a convicted felon on the least restrictive conditions necessary to assure appearance at sentencing, unless the felon is found to be a danger to the community. This standard favors post-conviction release. S. 1554 would require a convicted felon to make a convincing presentation of why he should be released.

S. 1554 also allows the Government to appeal release decisions. Currently, a defendant can appeal a judge's decision to detain him but the Government may not challenge a decision to release a suspect who may be likely to flee. S. 1554 puts the suspect and the Government on equal footing in this regard.

While I believe that S. 1554 is a positive step toward the comprehensive revision of bail laws necessary to allow courts to detain defendants who may pose a danger to community safety, I do not yet believe the bill is free from flaw. For instance, it makes no allowance for the court to use money bonds or sureties to secure a suspect's appearance for trial.

Historically, suretyship has been a primary legal tool for inducing defendants to return to trial. Without question, this technique is abused when a suspect pays the bond with the fruits of his crime and then flees from justice. The subcommittee should examine, however, the prospect of giving courts authority to inquire into the source of the funds used to pay the bond. It should also consider ways to encourage sureties to properly supervise defendants and prevent them from committing other crimes while free on bail.

Before turning to our witnesses for additional advice on the content of S. 1554, we should briefly review what the Constitution says about bail. The eighth amendment says directly: "Excessive bail shall not be required." The Supreme Court clarified the origins and meaning of that language in 1952:

> The bail clause was lifted with slight changes from the English bill of rights act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. . . . Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the amendment fails to say all arrests must be bailable. *Carlson* v. *Landon*, 341 U.S. 524 [1952].

Accordingly, although bail may not be excessive, there is no absolute right to bail. Dangerousness of the defendant is not barred by the Constitution as a consideration in bail proceedings.

With this constitutional background, the subcommittee now looks forward to discussing with its witnesses what the future of bail should be.

I think what we will do is begin with our first witness, who is Mr. Jeffrey Harris. We would like to welcome you to the subcommittee, Mr. Harris.

Mr. Harris is the Deputy Associate Attorney General of the United States. As such, he is the principal Deputy to the Associate Attorney General, who is the senior Department of Justice official responsible for all criminal justice matters.

Mr. Harris assumed his present position in August 1981 after serving as the executive director of the Attorney General's Task Force on Violent Crime. Most recently, he was with the Federal Trade Commission where he was the Assistant Director for Marketing Abuses. With an extensive background in the area of criminal justice, we look forward to hearing your recommendations on bail reform.

## STATEMENT OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROGER PAULEY, DIRECTOR, OFFICE OF LEGISLATION, CRIMINAL DIVISION; AND KAREN SKRIVSETH, LEGISLATIVE COUNSEL, OFFICE OF LEGAL POLICY

Mr. **Harris**. Thank you, Mr. Chairman. Let me first introduce my colleagues, Karen Skrivseth and Roger Pauley, both from the Department, accompanying me today.

Mr. Chairman, if it comports with your wishes and desires I have a rather lengthy statement I would like to submit for the record and orally give a briefer summary.

Senator **Hatch**. We would appreciate that. We would like you to limit your statements to around 10 minutes if you can. For the benefit of everybody who testifies here today, we will put their full written statements in the record as though fully delivered. That will leave a little more time for the questions that we will present after your testimony.

Mr. **Harris**. Thank you, Mr. Chairman.

First, I would like to thank you for the opportunity to present the views of the Department of Justice on the issue of bail reform. In recent years, Federal bail laws have been the subject of increasing criticism and debate.

In just the past year, both the President and the Chief Justice have called for reform of our bail laws and the Attorney General's Task Force on Violent Crime, on which I served as the executive director, made several recommendations aimed at improving the Federal bail laws. In addition, the introduction of numerous bail reform bills this year by Members of Congress underscores the widely held view that there is an urgent need to provide the Federal courts with the tools to make rational and appropriate bail decisions.

The Department of Justice shares the position held by many in Congress, the judiciary, the law enforcement community, and the public at large, that we must act to address the deficiencies in our bail laws. In our view, S. 1554 sets forth the basic framework for much-needed bail reform, although we would suggest several ways in which we think its provisions can be improved.

In my statement today, I will first discuss the reforms the Department recommends and then the necessary improvements that we would recommend with regard to S. 1554.

The most prevalent criticism of the Bail Reform Act is that it does not permit courts, except in capital cases, to consider in the context of pretrial release decisions the danger a defendant may pose to others if released. The sole issue that may be addressed is the likelihood that the defendant will appear for trial. Thus courts are without the authority to impose conditions of release geared toward assuring community safety or to deny release to those defendants who pose an especially grave risk to the safety of the community if released on bail.

If the court believes that a defendant poses a danger, it faces a dilemma: It can release the defendant prior to trial in spite of these fears, or it can find a reason such as risk of flight to detain the defendant by imposing high money bond. Too often, the resolution of this dilemma causes a court to make an intellectually dishonest determination to protect the community.

In order to provide an adequate mechanism to deal with dangerous defendants who are seeking release, Federal bail laws must be changed. First, the issue of a risk the defendant may pose to community safety must be acknowledged as a legitimate concern in all release decisions. Second, the courts must be given the authority to order the detention of those defendants who are so dangerous that no condition of release will reasonably assure the safety of the community or other persons.

We believe that judges can, with an acceptable level of accuracy, identify those defendants who are most likely to pose a danger to the safety of others if they are released prior to trial. While such predictions are not infallible, it is clear that the presence of certain combinations of offense and offender characteristics, considering the nature and seriousness of the charge, the extent of prior arrests and convictions, the history of drug addiction and the like, have a strong positive relationship to whether the defendant will commit a new offense while on bail.

Already under the Bail Reform Act courts are required to predict defendant behavior with respect to the issue of appearance, and also when in juvenile proceedings, the question of danger is considered and predicted by judges. Nonetheless, since predictions of future criminality are problematic, we recommend generally that pretrial detention should be ordered only when the facts indicating the dangerousness of a defendant have been established by clear and convincing evidence. This would provide a high standard for invoking pretrial detention on a case-by-case basis. It is consistent with the recommendation of the Task Force on Violent Crime.

However, we do believe that one group of defendants, those who in the past have committed and been convicted of a serious crime while in a pretrial release status, should be presumed to be dangerous and ineligible for release. Such a defendant has already established beyond a reasonable doubt, first, that he is dangerous, and second, that he cannot be trusted to abide by the law while he is on pretrial release.

It is our view that if there is a high probability that a person will commit crimes while on release, the need to protect the public becomes sufficiently compelling so that a defendant should not be released pending trial. We understand a defendant's interest in remaining free prior to conviction, and in some circumstances that interest is outweighed by the need to protect societal interests.

It is, in essence, what has served to support court decisions in the past sanctioning denial of bail to defendants who have threatened witnesses or posed significant risk of flight. In such cases, the societal interest at issue was the need to protect the integrity of the judicial process. Surely the need to protect the innocent from brutal crimes is an equally compelling basis for ordering detention pending trial.

In reaching the conclusion that our bail laws must be amended to permit courts to deny bail to those who pose the most grave risk to the safety of others and the community, we have given full consideration to the question of whether such a statute would be constitutional. It is our conclusion that a pretrial detention statute that is appropriately narrow in application and that provides sufficient procedural safeguards would pass constitutional muster. That position has been bolstered by the recent decision in *United States* v. *Edwards,* decided in May 1981, in which the District of Columbia Court of Appeals en banc upheld the constitutionality of the District of Columbia's pretrial detention statute.

There are other measures which we feel will reduce the commission of crimes committed while on bail. We believe that pretrial detention of the most dangerous defendants will do much to reduce the number of crimes now committed by persons released pending trial. There are more modest changes, however, which should be made in our bail laws that would also enhance our ability to deter, and respond effectively to bail crime.

First, the Department, like the Violent Crime Task Force, recommends that whenever a defendant is ordered released the court should be required to impose a condition that the defendant not commit other crimes while on release. This is so obvious as to almost sound foolish in stating.

Second, we recommend that a violation of a condition of release, the commission of another serious crime on bail, should result in the revocation of a defendant's release. We believe that once it has been established that there is probable cause to believe that a released defendant has committed another serious crime, the defendant has through his own actions established his dangerousness and inability to abide by the conditions of his release, and that he should, without any additional showing, be ordered detained.

Third, we recommend the adoption of a provision that would permit temporary detention for a period of up to 10 days of a defendant who has been arrested for a crime and is already on some form of conditional release, such as bail, probation, or parole. Such a provision is now included in S. 1554 and the criminal code bill introduced this year, S. 1630. It would give the arresting authorities a reasonable opportunity to contact those authorities who originally released the defendant so that they may, if appropriate, pursue revocation proceedings in light of the defendant's subsequent arrest.

Fourth, for the most part the forms of conditional release sanctioned by the Bail Reform Act have been adequate to assure the appearance of defendants at trial. Statistically, the rate of failure to appear among Federal defendants is quite low. Nonetheless, there is an identifiable minority of defendants as to whom no form of conditional release is adequate to assure appearance.

With respect to these defendants, the court should be given clear statutory authority to deny release without the need to impose high money bond to accomplish this result. While the Bail Reform Act contains no provision authorizing the court to detain outright a defendant that it finds poses a significant flight risk, the implicit authority of the courts to deny pretrial release to defendants who are likely to flee to avoid prosecution has been recognized in case law.

However, despite this case law upholding the power of the court to order the detention of defendants who are severe flight risks, it has been our experience that many judges are reluctant to exercise this power because of the absence of specific authority in the Federal bail statutes.

### POST-CONVICTION RELEASE

The Violent Crime Task Force described the present standard governing release after conviction was described as one of the most disturbing aspects of the Bail Reform Act. It presumptively favors the release of convicted persons who are awaiting the imposition and execution of sentence or who are appealing their convictions. Like the task force, the Department is of the view that there are compelling reasons for abandoning the present standard which presumptively favors post-conviction release.

The Bail Reform Act provides that defendants have the opportunity to move for reduction of bond or seek reconsideration and review of release decisions. However, the act does not provide the Government with any analogous right to appeal bail decisions. Thus, the situation has arisen where, faced with what it believes to be an improper release determination, the Government is powerless to seek review of a hastily made decision which permits a defendant to flee the jurisdiction or return to the community to commit further crimes. We believe that both as a matter of sound policy and basic fairness, the Government should be given clear statutory authority to appeal release decisions.

We also believe that penalties for bail jumping ought to be closely analogous to the penalties for the underlying crime. All too often, the 5-year maximum for bail jumping in no way deters someone who may be faced with a much longer sentence if convicted on the underlying crime. We believe that the bail statutes ought to be changed to make the penalties for bail jumping more closely analogous to the penalty for the underlying crime.

We also think that increasingly Federal prosecutors are faced with the problem of defendants, particularly those engaged in highly lucrative criminal activities such as narcotics transactions, who forfeit large amounts of bail. These defendants, who use the proceeds of their illicit activities to post bond or provide collateral for corporate surety bonds, view forfeiture of bond simply as a cost of doing business. Indeed, there appears to be a growing practice with regard to setting aside some portion of the proceeds of these businesses to cover bail expenses.

We believe that the Government ought to have a right to inquire into and determine the source of funds or property which is offered as bail. We think that this right ought to be statutory and our bail laws ought to be amended to so reflect.

I noted, by the way, that Senator Hawkins introduced a bill this morning, S. 1755, which embodies that principle but limits it to drug cases. We agree with her general approach but think it ought to be broadly applied in all criminal cases.

My time is running short, but I want to touch a few amendments we would recommend to S. 1554. We believe that with regard to the standard for pretrial detention, that the Government as a general rule should be required to establish the facts indicating dangerousness of a defendant by clear and convincing evidence before pretrial release may be denied on that basis.

However, we do not believe that the Government should be required to make a showing where the defendant has been previously convicted of a serious crime while previously in a pretrial release status. In our view, such defendants should be presumed to be dangerous, at least if the previous conviction occurred within a 5-year period.

Our second concern, and one of our strongest concerns, is with the S. 1554 standard for pretrial detention, namely that the Government be required to establish by a substantial probability that the person committed the underlying offense before bail can be denied on dangerousness grounds. This is the current standard in the D.C. Code, and we believe it is the reason why the District of Columbia U.S. attorney has not used the preventive detention statute to the full extent to protect the public.

We believe that the appropriate standard is probable cause. The same probable cause standard which is sufficient for indictment, which is also sufficient for arrest, we believe ought to be the general standard. The courts ought to consider dangerousness of a defendant if they are satisfied that there is probable cause to believe the defendant committed the crime.

Senator HATCH. Mr. Harris, I have to go and vote. I am going to ask my counsel, Mr. Rader, to continue to take your testimony and ask some questions until I can get back. If it so happens that he finishes with you, then we will call on our next witness, who will be Mr. Jerry Watson, who will be representing the Professional Bondsmen of the United States.

If you will forgive me, I just have to go vote but I would like to continue this with the limited time I have this afternoon and get this record built. I will be right back as soon as I can. Just proceed.

Mr. HARRIS. Yes, Senator.

Our objections to the substantial probability requirement stem not only from the view that the probable cause requirements of the current law are sufficient to assure the validity of the charges against the defendant and to support in appropriate cases the determination to deny release, but also from the practical problems entailed in coming forward with additional evidence necessary to meet this standard.

As I said, in our experience and in discussions with prosecutors in the District of Columbia, these difficulties in meeting the analogous requirement under the District of Columbia's pretrial detention statute were cited as the principle reason for the prosecutors' failure to request a pretrial detention hearing as required under that statute for most of the last 10 years. Thus, we recommend the deletion of the requirement that the Government demonstrate a substantial probability that the defendant committed the crime with which he is charged before detention may be ordered.

Second, proposed section 3124(d) of title 18 permits the temporary detention of a defendant who has committed a crime while on a form of conditional release. The purpose of this section is to permit the defendant to be held in custody for a short period of time while the original releasing authorities can be notified of his arrest and take appropriate action to revoke his release.

However, this section of the bill permits temporary detention of such defendants only if the court finds that no condition or combination of conditions of release will reasonably assure the appearance of the person as required and the safety of any other person and the community. This is essentially the same finding that is required to support pretrial detention on the basis of dangerousness or risk of flight under proposed section 3142(e).

In light of the class of defendants to which this temporary detention provision applies—those arrested while on release, probation, or parole—we believe that a less stringent standard is appropriate. For example, in the analogous temporary detention provisions of the D.C. Code and the criminal code revision bill, S. 1630, the court needed only to find that the defendant may flee or pose a danger. We urge the same standard be incorporated in S. 1554.

With regard to penalties for failure to appear, proposed section 3146 of the bill incorporates the current penalty for bail jumping: up to 5 years' imprisonment where the originally charged offense was a felony and up to 1 year's imprisonment where the originally charged offense is a misdemeanor. As I discussed earlier, we advocate that penalties for bail jumping more closely parallel the penalties for the offense with which the defendant was charged when released.

Revocation of release is one of the sanctions for the violation of a condition of release permitted under proposed section 3148 of the bill. We believe that this is a particularly appropriate sanction where the condition violated is the mandatory condition in sections 3142(b) and (c)(1), that the defendant not commit another offense during the period of his release. We strongly recommend that 3148 be amended so that revocation of release is required where there is probable cause to find that the defendant violated the condition that he not commit an offense while in release.

With regard to money bail, under the current law a defendant may be required, in order to obtain release, to post either 10 percent appearance bond or execute a bail bond secured by the pledge of solvent sureties or the deposit of cash. S. 1554 proposes a novel concept of abandoning the use of money bond, an approach about which the Department has serious reservations.

As we understand it, the principal rationale advanced in supporting the abandonment of the use of financial conditions of release is that as long as judges have the option of requiring the posting of money bond, they will continue to use excessively high bond as a means of detaining defendants who are poor bail risks because of their desire to circumvent the time-consuming procedural safeguards that would be a necessary part of pretrial release proceedings.

While we agree that requiring unreasonably high money bond as a shortcut method of achieving detention is improper, we do not believe that the concern that judges may misuse the money bond condition justifies the drastic remedy of eliminating money bond altogether. Historically, money bond has been one of the primary methods of assuring appearance at trial, and we believe that for many defendants it has been and remains a highly effective deterrent to flight, for example when the money bond posted belongs to a parent or close relative of the accused. Furthermore, we believe that effectiveness of money bond in assuring appearance can be greatly enhanced if, as we have suggested, the courts are given clear authority to inquire into the source of the funds being posted.

On the other hand, we are unaware of any basis for concluding that judges would continue to achieve pretrial detention through the use of high money bond if they were able to achieve this purpose directly. In short, although the money bond condition could be used to circumvent detention procedures, it seems an excessive reaction to abolish it altogether in the face of experience and logic indicating that it can be an effective tool for assuring the appearance of some defendants. Moreover, the extent of abuse may well decline once Federal judges are presented with lawful alternative procedures, namely preventive detention, for considering dangerousness.

Lastly, in our experience the prospect of forfeiting bond is an inadequate deterrent to flight not only when the amount of bond is too low but also when the bond is from the proceeds of illegal activity. This problem can be addressed by providing—as does S. 1554—the Government with the right to appeal conditions of release. When the funds used to secure release are the proceeds of criminal activity, we suggest this problem can be cured by adopting the recommendation of permitting the courts to inquire into the source of the property used to post bond.

Permitting the courts to inquire into the source of the property used to secure release is necessary whenever the prospect of forfeiture of property is intended to assure appearance. Thus, whether the subcommittee decides to retain money bond or to adopt the present structure of S. 1554, which includes among the forms of conditional release a provision that the defendant agree to forfeit designated property if he fails to appear, the Department recommends that the bill include a provision for a hearing into the source of the property offered as a means of securing release.

That concludes my statement, and I would be pleased to answer questions.

Mr. RADER. Thank you very much, Mr. Harris.

Senator Hatch has prepared a few questions which perhaps I could pose to you at this time.

I note from your statement that the Justice Department favors giving the Federal courts specific statutory authority to inquire into the source of money or other property which is offered to meet financial conditions of release. This would serve the needed function of assuring that a suspect is not meeting bail requirements with the fruits of his crime, a very real prospect, particularly in drug offenses, according to testimony taken by this subcommittee last month.

I have two questions about this procedure: First, would this kind of hearing impose a very difficult administrative burden upon the Federal courts? Second, a corollary to the first, could that court burden be reduced by placing the burden of proof on the defendant to show that the money he offered was clean? Would you suggest writing into the statute a provision placing that burden of proof on the defendant?

Mr. HARRIS. Well, the answer to the first is, of course, any time you require an additional court proceeding there will be some administrative burden. However, I suggest to you that the administrative burden of inquiring into the source of the security for bond is probably less than the administrative burden the court faces in issuing a bench warrant, of the cost to the law enforcement community of then searching for the defendant who flees, in carrying the indictment in an open status for years and years, and then finally having to eventually prosecute it if found or to keep the warrant in an active status indefinitely.

As to the burden of proof, I believe that the burden ought to be on the defendant to establish that the source of the funds which he tenders to the court are from legitimate sources and therefore will act as security for his appearance. Right now in the cases which I know in which courts have held such hearings, that is the procedure they generally follow. The defendant comes in with a suitcase full of cash or some other security, and it is up to him to identify and establish the source of those funds and to satisfy the court as to whether that property really will act as assurance for his appearance. If the court is not satisfied, they do not accept it, and that is the way it ought to work.

Mr. **Rader**. Thank you very much.

Let me approach another aspect of money bonds. As you know, if a surety shows up at a courtroom and discovers that the defendant is not present, the judge does not necessarily possess any discretion in the law to postpone the forfeiture date on the bond to give the surety a few days to produce the defendant. Does this operate against the interests of the justice system?

In other words, if the surety forfeits his bond the moment that the defendant fails to appear, does he have any incentive to find the fugitive and bring him to court? Should the law contain a provision which would give the court the discretion to postpone this forfeiture date on the bond, or maybe to remit a portion of the forfeited bond to give the surety some kind of incentive to produce the suspect?

Mr. **Harris**. Well, clearly one of the benefits of a surety is that if the defendant does not appear in court, you would hope the surety would begin to look for him and produce him for the court. To the extent that you cause the bond to be immediately forfeited the surety will have less incentive to find that person. If the surety has a $100,000 or $500,000 surety bond riding on finding the defendant, you do not have to be much of an economist to understand that the surety will be looking for that defendant.

I think there ought to be some flexibility built into the system so that a judge could give the surety time to produce the defendant. However, as with other things, it should not be open-ended. At some point, if the defendant fails to appear the surety bond ought to be forfeited but there ought to be a reasonable opportunity for the surety to find the defendant and bring him to court.

Mr. **Rader**. Thank you. I would like you to expand a little bit on one of the things which you discussed in your testimony. S. 1554 contains a provision making the standard for pretrial release or detention whether the Government can show a substantial probability that the suspect committed the offense.

I understand, as you noted, that this is the standard used in the D.C. Code for pretrial detention. However, do you think this standard, which I presume is higher than the traditional probable cause standard, is necessary? What did the case in *United States* v. *Edwards* which recently upheld the D.C. Code provisions say about these two standards?

Mr. **Harris**. Well, first, I think that imposition of that standard defies logic, and I will tell you why. We are talking about a determination to allow a court, if they find someone to be dangerous, to order that person to be held. The court ought to be convinced that someone is dangerous, and we propose that the court ought to not make a frivolous determination. The facts which give the court reason to believe someone is dangerous ought to be established by clear and convincing evidence.

That makes sense to us because it says if you are going to hold someone who is dangerous you have to have a good basis for doing it. However, requiring that the Government establish that there is a likelihood or a greater likelihood than probable cause that the defendant is guilty of the underlying offense, makes no sense. We now can detain someone who poses a risk of flight, based on probable cause. There is no rational distinction for requiring a higher standard for one reason of pretrial detention than for another.

In *United States* v. *Edwards,* I think it is fair to say the court expressed some question as to whether this higher standard really is a good idea or would be required. It seems to me that if you buy onto the notion that there is a valid public purpose—namely, protection of society from brutal, vicious people—that is to be accomplished by detaining them pretrial for dangerousness, that the age-old standard of probable cause which has been in our law for hundreds of years and the English law preceding that, is a sufficient standard on which to hold someone.

Some of the problems which arise when you require a greater standard include the fact that the defendant often uses that kind of a hearing to receive discovery which he would not be entitled to under the Federal Rules of Criminal Procedure. It is often used as a way to try to figure out who the Government's witnesses will be. It is often used as a way to try to intimidate Government witnesses.

All one has to do is read the facts of *United States* v. *Edwards,* which was a fairly vicious rape case, and see the way that the defense tried to use the substantial probability standard to question the rape victim at a bail hearing, to understand why this standard has deterred the U.S. attorney in the District of Columbia from using this preventive detention law to protect the public, as was intended by the Congress.

Mr. RADER. Thank you very much.

Debates on pretrial detention have often featured a great deal of discussion here in Congress and elsewhere about whether it is consistent with the rule of evidence that a defendant is presumed innocent, or with due process guarantees against punishment before conviction. Sometimes even the eighth amendment is raised as a potential bar to pretrial detention. Could you comment on these arguments? Do you see the Constitution as a bar to making one class, namely the class of individuals who are arrested and found dangerous to the safety of the community, unbailable?

Mr. HARRIS. Well, with regard to the eighth amendment, I think the eighth amendment means what it says and on the face of it, it is clear that there is no right to bail.

As to the other parts of your question, I believe that there are no constitutional prohibitions to considering dangerousness in a bail decision.

Would you please give me the first question of the three? I do not think I have answered that one.

Mr. RADER. The three items that are often mentioned are the rule of evidence, that an individual is presumed innocent; and then the due process guarantee against punishment before they are convicted; and I think you responded well to the third, which was the eighth amendment question.

Mr. **Harris**. The due process about punishment, pretrial detention is not punishment and its purpose is not punishment. It has a very different purpose. It has the same effect: someone is detained. However, I think the courts have held in a series of decisions that if the purpose of the detention carries out some valid public safety purpose and not punishment, then there is no problem.

With regard to the presumption of innocence, I think that the presumption of innocence is the least understood doctrine in American criminal law. Most people think that the presumption of innocence is found in the Constitution; it is not.

The presumption of innocence is a stage direction to the jury as to what frame of mind they are to begin the trial with. They are to presume the defendant innocent. It is a rule of evidence and, if you will, a stage direction to the jury. It has nothing to do with the question of whether someone ought to be entitled to pretrial release.

Mr. **Rader**. Thank you.

Since the most marked difference between your position and S. 1554 seems to be your urging that money bond not be abandoned, I would like to ask you to comment further on why we should not do away with financial release conditions. If the reason the money bond is unpopular is that judges have used unreasonably high money bonds as a shortcut method of accomplishing pretrial detention, will this bill's provision on pretrial bail prevent the use of unreasonably high money bonds?

Mr. **Harris**. I think that the changes which we have suggested, and which S. 1554 goes a long way toward implementing, will in fact reduce the use of money bond and will meet a number of the objections that people who oppose money bond presently have.

As to the objection that money bond works against the poor or incarcerates people without means, if you do away with money bond you do away with one of the traditional means of deterring someone from fleeing. I would be very loath to do away with that until I knew that the system I was going to replace it with would be equally as effective.

I have several problems with it. First, even if you had some "ability to pay" standard, every time a judge set bail the defendant would say he did not have the ability to pay, and then we would really begin to get into an administrative nightmare. We would begin to have what is known in the income tax business as net worth tax cases, you would have to prove whether the defendant could or could not meet the bail. I think it is a mistake to do away with money bail.

As to S. 1554's provision that someone ought to be required to agree to forfeit property, it seems to me that a defendant who is going to flee is going to take the property with him, whether it be a bank account, whether it be a car, and that the courts ought to have the ability to have that property deposited with them. We should not begin to go on the honor system. I do not believe that will work.

Mr. **Rader**. Thank you very much, Mr. Harris. The subcommittee would like to thank you for testifying, and notes your distinguished service both in the Justice Department and as executive director of the Attorney General's Task Force on Violent Crime. We thank you very much for your contribution today.

Mr. **Harris**. I thank you. I think that reform of the bail laws is one of the single most important things that the Congress can do to assure the American public that we are going to have a proper balance between the rights of individiual defendants and the rights of society at large. Most people are simply trying to get through the day in a way in which they can enjoy the liberty that the Constitution promises without the fear of being victimized by people who are committing crimes, both from those arrested and released on bail, and others.

Mr. **Rader**. Thank you very much.

[The prepared statement of Jeffrey Harris follows:]

## PREPARED STATEMENT OF JEFFERY HARRIS

Mr. Chairman and Members of the Subcommittee:

I would like to thank you for the opportunity to present the views of the Department of Justice on the issue of bail reform. In recent years, federal bail laws have been the subject of increasing criticism and debate. In just this past year, both the President and the Chief Justice have called for reform of our bail laws, and the Attorney General's Task Force on Violent Crime, which I served as Executive Director, made several recommendations aimed at improving federal bail laws. In addition, the introduction of numerous bail reform bills this year by members of Congress underscores the widely held view that there is an urgent need to provide the federal courts with the tools to make rational and appropriate bail decisions.

The Department of Justice shares the position held by many in the Congress, the judiciary, the law enforcement community, and the public at large, that we must act to address the deficiencies of our bail laws. In our view, S. 1554 sets forth the basic framework for much needed bail reform, although we will suggest several ways in which we think its provisions can be improved.

Presently, federal release practices are governed by the Bail Reform Act of 1966. Prior to its enactment, the decision to release a defendant on bail was largely a matter within the discretion of the courts, and there was little statutory guidance to assist the courts in the exercise of this discretion. Furthermore, an overdependence on cash bonds coupled with delays in bringing defendants to trial, which have now been substantially reduced through implementation of the Speedy Trial Act of 1974, resulted in the lengthy pretrial incarceration of too many federal defendants, a disproportionate number of whom were poor. The Bail Reform Act, by providing a comprehensive set of criteria to be applied by the courts in making release determinations and encouraging the use of forms of conditional release tailored to the characteristics of individual defendants as alternatives to the use of cash bond, did much to achieve fairer and more rational bail decisions - goals which the Department of Justice continues to support.

However, nearly fifteen years of experience with the Bail Reform Act have demonstrated that, in some important respects, that Act does not permit the courts to make release decisions that strike the proper balance between the rights of defendants and the need to protect the integrity of our judicial process and the safety of the public.

In my statement today, I will first discuss the reforms which the Department recommends to achieve necessary improvements in our bail laws. Many of these recommendations are, as I will note, the same as, or similar to, those made by the Violent Crime Task Force. I will then turn to a discussion of S. 1554 in light of these recommendations.

1. Consideration of Dangerousness in the Pretrial Release Decision.

The most prevalent criticism of the Bail Reform Act is that it does not permit the courts, except in capital cases, to consider in the context of the pretrial release decision, the danger a defendant may pose to others if released. The sole issue that may be addressed is the likelihood that the defendant will appear for trial. Thus, the courts are without authority to impose conditions of release geared toward assuring community safety or to deny release to those defendants who pose an especially grave risk to the safety of the community if released on bail. If the court believes that a defendant poses a danger, it faces a dilemma; it can release the defendant prior to trial in spite of these fears, or it can find a reason, such as risk of flight, to detain the defendant by imposing high money bond. Too often the resolution of this dilemma causes the court to make an intellectually dishonest determination that the defendant may flee when the real problem is that he may pose a danger to others.

We believe that the law must be changed so that it recognizes that the danger a defendant may pose to others is as valid a consideration in the pretrial release determination as is the presently permitted consideration of the likelihood that the defendant will flee to avoid prosecution. It is, in our view, intolerable that the law denies judges the tools to make honest and appropriate decisions regarding dangerous defendants.

The concept of permitting an assessment of defendant dangerousness in the pretrial release decision has been widely supported. Last month, the President, in an address to the International

Association of Chiefs of Police, called for an amendment of current law to permit pretrial detention of the most dangerous federal defendants. In February of this year, the Chief Justice in his annual address to the American Bar Association, noting the "startling amount of crime committed by persons on release pending trial," stressed the need to provide greater flexibility in our bail laws so that judges may give adequate consideration to the element of future criminality in making bail decisions. Endorsements of the validity of weighing the issue of dangerousness are incorporated in the standards of such groups as the American Bar Association,[1] the National Conference of Commissioners on Uniform State Laws,[2] the National District Attorneys Association,[3] and the National Association of Pretrial Service Agencies.[4] Furthermore, the laws of several states recognize that dangerousness is an appropriate concern in bail determinations,[5] as does the District of Columbia Code, passed by the Congress in 1970, which provides that the risk a defendant poses to community safety may be a factor in setting release conditions and may also, in certain circumstances, serve as the basis for denying release entirely.[6]

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[1] American Bar Association, Standards Relating to the Administration of Criminal Justice: Pretrial Release (1979), Standards 10-5.2, 10-5.8, and 10-5.9.

[2] National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (1974), Rule 341.

[3] National District Attorneys Association, National Prosecution Standards: Pretrial Release (1977), Standard 10.8.

[4] National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release and Diversion (1978), Standard VII.

This widely based support for giving judges the authority to weigh risks to community safety in bail decisions is a response to the growing problem of crimes committed by persons on release-- a problem that is growing in spite of the not uncommon practice of setting high money bond to detain potentially dangerous defendants. In a study conducted by the Lazar Institute (hereinafter cited as the "Lazar" study), "[a]pproximately one out of six defendants in the eight-site sample were rearrested during the pretrial period. Almost one-third of these persons were rearrested more than once, some as many as four times, before their original cases were settled."[7] A similar level of pretrial criminality was reported in a study of release practices in the District of Columbia conducted by the Institute for Law and Social Research (hereinafter cited as the "INSLAW" study), where 13% of all felony defendants released were rearrested in the pretrial period. Among defendants released on surety bond, the form of conditional release which under the D.C. Code, like the Bail Reform Act, is used for only those defendants who are the greatest bail risks, the incidence of pretrial arrest reached the alarming rate of 25%.[8] Of course, there are studies which report lower incidences of rearrest of released persons. For example, a study designed to assess the effectiveness of pretrial service agencies established under the Speedy Trial Act reported a marked decline in rearrest rates from 10% to 4% in the ten demonstration districts.[9]

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[5] States permitting some consideration of defendant dangerousness in the pretrial release determination include Alabama, Alaska, Arkansas, Colorado, Delaware, Hawaii, Kentucky, Maryland, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, and Virginia. Also, two states, Wisconsin and Michigan, recently passed amendments to their state constitutions to permit consideration of dangerousness in the bail determination and to permit pretrial detention.

[6] 23 D.C. Code §§ 1321 and 1322.

[7] Lazar Institute, Pretrial Release: A National Evaluation of Practices and Outcomes - Summary and Policy Analysis, Washington, D.C., August 1981, [hereinafter cited as Lazar] at 48.

While statistics on rearrest rates, although they vary considerably, give some indication of the extent of the problem of pretrial criminality, it is probable that such statistics underestimate the seriousness of the problem of dealing with dangerous defendants under the Bail Reform Act. First, we know that many crimes remain unsolved and never result in arrest, and thus cannot be reflected in figures based on rearrest rates. Second, we know that many of the most dangerous defendants are already detained by virtue of an inability to post bond. For example, one factor that is considered a good indicator of whether a defendant will commit additional crimes if released is the extent and seriousness of his prior criminal record. And, indeed, in the Lazar study, released defendants who were rearrested had an average of five prior arrests compared with an average of three prior arrests for those released defendants who were never rearrested during the pretrial period. But defendants who were detained prior to trial, primarily because of an inability to post bond, had an average of 9.5 prior arrests.[10]

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[8] Report of the Institute for Law and Social Research on Pretrial Release and Misconduct in the District of Columbia, November 27, 1978 [hereinafter cited as INSLAW], at I-11, I-33.

[9] Administrative Office of the United States Courts, Fourth Report on the Implementation of the Speedy Trial Act of 1974, Title II, Washington, D.C., June 1979, at 49.

In order to provide an adequate mechanism to deal with dangerous defendants who are seeking release, federal bail laws must be changed. First, the issue of the risk a defendant may pose to community safety must be acknowledged as a legitimate concern in all release decisions. Second, the courts must be given the authority to order the detention of those defendants who are so dangerous that no conditions of release will reasonably assure the safety of other persons and the community.

We do not suggest that pretrial detention will entirely solve the problem of pretrial criminality or that it is appropriate for more than a relatively small proportion of federal defendants.

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[10] Lazar, *supra*, n.7 at 12, 22.

However, we must recognize that much of the dangerous and violent crime now plaguing the country is committed by career criminals, those who have absolutely no respect for the law or the rights of our citizens, and who repeatedly commit crimes with a not unwarranted confidence that the odds of their being arrested, much less sent to prison for their crimes, are very much in their favor. It is with respect to this group of defendants that the courts must be given the opportunity to consider the option of pretrial detention.

We believe that judges can, with an acceptable level of accuracy, identify those defendants who are most likely to pose a danger to the safety of others if they are released prior to trial. While such predictions are not infallible, it is clear that the presence of certain combinations of offense and offender characteristics, considering such questions as the nature and seriousness of the offense charged, the extent of prior arrests and convictions, and a history of drug addiction, have a strong positive relationship to the probability that the defendant will commit a new offense while on release.

Already under the Bail Reform Act, the courts are required to predict defendant behavior with respect to the issue of appearance. Under that Act, the courts are also required to predict whether a convicted defendant who is awaiting sentence or completion of his appeal will pose a danger to the community if released.

Similarly, a federal magistrate may detain a juvenile under 18 U.S.C. 5034 pending his juvenile delinquency proceeding in order to insure the safety of others. We see no reason why similar assessments of the probability of future criminality should not also be made as to adult defendants awaiting trial. Indeed, the INSLAW study indicated a greater ability to predict pretrial rearrest than failure to appear.[11]

Nonetheless, since predictions of future criminality are problematic, we recommend generally that pretrial detention should be ordered only when the facts indicating the dangerousness of the defendant have been established by "clear and convincing" evidence. This would provide a high standard for invoking pretrial detention on a case-by-case basis. This is consistent with a recommendation of the Violent Crime Task Force. However, like the Violent Crime Task Force, we also believe that there is one group of defendants -- those who have in the past committed a serious crime while on pretrial release -- who should be presumed to be dangerous and ineligible for release. Such a defendant has already established beyond a reasonable doubt, first, that he is dangerous, and second, that he cannot be trusted to abide by the law while on release. A provision that would deny release to these defendants would not only incapacitate those who have demonstrated that they are likely to engage in further criminal activity if released, it would also, in our view, serve as a strong deterrent to criminal conduct by those who are released.

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[11] INSLAW, Supra n.8, at xiii.

Pretrial detention is a serious matter, for it deprives a defendant of his liberty prior to an adjudication of guilt, and, as noted above, we do not believe it is appropriate for other than the small, but identifiable, group of most dangerous defendants. However, it is our view that where there is a high probability that a person will commit additional crimes if released, the need to protect the public becomes sufficiently compelling that a defendant should not be released pending trial. This rationale -- that a defendant's interest in remaining free prior to conviction -- is, in some circumstances, outweighed by the need to protect societal interests -- is, in essence, that which has served to support court decisions sanctioning the denial of bail to defendants who have threatened jurors or witnesses,[12] or who pose significant risks of flight.[13] In such cases, the societal interest at issue was the need to protect the integrity of the judicial process. Surely, the need to protect the innocent from brutal crimes is an equally compelling basis for ordering detention pending trial.

It is the Department's position that giving the courts the authority to deny release to defendants who pose a serious and demonstrable danger to the safety of others is not only sound policy, but would also represent a more honest way of addressing the problem of potentional misconduct by persons seeking release. Despite the fact that the Bail Reform Act prohibits any consideration of defendant dangerousness, much less detention based on a high probability of future criminality, it is widely believed that many courts do achieve the detention of particularly dangerous defendants by requiring the posting of high money bond, even if the defendants may pose little risk of flight.

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[12] See, e.g., United States v. Wind, 527 F.2d 672 (6th Cir. 1975); United States v. Gilbert, 425 F.2d 490 (D.C.Cir. 1969).

[13] See, e.g., United States v. Abrahams, 575 F.2d 3 (1st Cir. 1978).

That such instances of de facto detention of dangerous defendants would occur is hardly surprising. As noted earlier, current law places our judges in a desperate dilemma when faced with a clearly dangerous defendant seeking release. On the one hand, the courts may abide by the letter of the law and order the defendant released subject only to conditions that will assure his appearance at trial. On the other hand, the courts may strain the law, and impose a high money bond ostensibly for the purpose of assuring appearance but actually to protect the public. Clearly, neither alternative is satisfactory. The first leaves the community open to continued victimization. The second, while it may assure community safety, casts doubt on the fairness of release practices.

Providing statutory authority, in limited circumstances, to order the detention of especially dangerous defendants would, in our view, permit the courts to address the issue of pretrial criminality both effectively and honestly. Furthermore, we believe that this alternative would be fairer to defendants than the present practice. In the pretrial detention hearing, the government would be required to come forward with evidence bearing squarely on the dangerousness of the defendant, and the defendant would be provided an opportunity to respond directly to this evidence.

In reaching the conclusion that our bail laws must be amended to permit courts to deny bail to those defendants who pose the most grave risks to the safety of other persons and the community, we have given full consideration to the question whether such a statute would be constitutional. It is our conclusion that a pretrial detention statute that is appropriately narrow in application and that provides sufficient procedural safeguards would pass constitutional muster. This position has been bolstered by the recent decision in United States v. Edwards (decided May 8, 1981), in which the District of Columbia Court of Appeals en banc upheld the constitutionality of the District of Columbia's pretrial detention statute. In this case, the court rejected the most commonly raised argument concerning the constitutionality of pretrial detention, that is, that pretrial detention is violative of the due process clause in that it permits punishment of a defendant prior to an adjudication of guilt. The court concluded, correctly in our view, that pretrial detention is not intended to promote the traditional aims of punishment such as retribution or deterrence, but rather that it seeks "to curtail reasonably predictable conduct, not to punish for prior act," and thus is constitutionally permissible under the Supreme Court's decision in Bell v. Wolfish, 441 U.S. 520 (1979).[14]

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[14] United States v. Edwards, No. 80-294, slip op. at 20-25, (D.C. App. May 8, 1981), petition for cert. filed, (July 8, 1981) (No. 81-5017).

### 2. Other Measures to Reduce the Commission of Bail Crime.

While we believe that pretrial detention of the most dangerous defendants will do much to reduce the number of crimes now committed by persons released pending trial, there are other more modest changes which should be made in our bail laws that would also enhance our ability to deter, and respond effectively to, bail crime.

First,, the Department, like the Violent Crime Task Force, recommends that whenever a defendant is ordered released, the court should be required to impose a condition that the defendant not commit another crime while on release. This mandatory condition was included in the bail provisions of S. 1722, the criminal code reform bill approved by the Senate Judiciary Committee in the last Congress. The Committee's report on S. 1722 described the need for inclusion of such a mandatory condition of release:

> While it may be self-evident that society expects all of its citizens to be law abiding, it is particularly appropriate, given the problem of crime committed by those on pretrial release, that this requirement be stressed to all defendants at the time of their release.15/

Second, we recommend that violation of this condition of release, i.e., the commission of another serious crime while on bail, should result in the revocation of the defendant's release. We believe that once it is established that there is probable cause to believe a released defendant has committed another serious crime, the defendant has, through his own actions, established his dangerousness and his inability to abide by the conditions of his release, and that he should, without any additional showing, be ordered detained

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15/ S. Rep. No. 96-553, 96th Cong., 2d Sess., 1075.

Third, we recommend the adoption of a provision that would permit temporary detention, for a period of up to ten days, of a defendant who has been arrested for a crime and is already on a form of conditional release such as bail, probation, or parole. Such a provision is now included in S. 1554 and the criminal code reform bill introduced this year (S. 1630). It would give the arresting authorities a reasonable opportunity to contact those authorities who originally released the defendant so that they may, if appropriate, pursue revocation proceedings in light of the defendant's subsequent arrest. A similar provision is now included in the release provisions of the D.C. Code, and in his testimony before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, United States Attorney Charles Ruff noted that this provision, which complements the D.C. Code pretrial detention statute, has been an extremely effective tool in dealing with recidivists.

3. Denial of Bail to Assure Appearance.

For the most part, the forms of conditional release sanctioned by the Bail Reform Act have been adequate to assure the appearance of defendants at trial. Statistically, the rate of failure to appear among federal defendants is quite low. Nonetheless, there is an identifiable minority of defendants as to whom no form of conditional release is adequate to assure appearance. With respect to these defendants, the courts should be given clear statutory authority to deny release without the need to impose high money bond to accomplish this result. While the Bail Reform Act contains no provision authorizing the court to detain outright a defendant that it finds is a significant flight risk, the implicit authority of the courts to deny pretrial release to defendants who are likely to flee to avoid prosecution has been recognized in case law.[16/]

Despite this case law upholding the power to order detention of defendants who are severe flight risks, it has been our experience that many judges are reluctant to exercise this power because of the absence of specific authority in the federal bail statutes. Again, as has been the case with extremely dangerous defendants, there is instead a tendency to achieve detention through the imposition of high money bonds. While we believe that, in some cases, money bond can be an effective mechanism for assuring appearance of a released defendant, it is also clear that in cases where the only means of assuring appearance is through detention, prosecutors sometimes feel compelled to achieve this result by seeking, and some judges are willing to set, money bonds in amounts the defendant cannot realistically be expected to meet.

This misuse of the money bond system can and should be avoided by giving the courts the authority to detain defendants who pose substantial flight risks. As noted by the Violent Crime Task Force in its endorsement of this change in our bail laws, permitting denial of bail in those cases where no form of conditional release will assure appearance is not only a more honest way of addressing the problem of flight to avoid prosecution, it is more effective as well. Too often we have been surprised by the ability of defendants who are engaged in extremely

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[16/] See, United States v. Abrahams, 575 F.2d 3 (1st Cir. 1978), and United States v. Meinster, 481 F. Supp. 1121 (S.D. Fla. 1979).

lucrative criminal activity -- particularly those who are major narcotics traffickers -- to meet extraordinarily high money bonds, and to willingly forfeit these bonds by fleeing the country. With respect to such defendants, the most stringent form of release recognized by the Bail Reform Act -- money bond -- is not sufficient to assure their appearance at trial. In such cases, the law should make it clear that an order of detention is appropriate.

4. Post-conviction release.

In the Violent Crime Task Force's discussion of its recommendations for amendments of current bail laws, the present standard governing release after conviction was described as "[o]ne of the most disturbing aspects of the Bail Reform Act," for it presumptively favors the release of convicted persons who are awaiting imposition or execution of sentence or who are appealing their convictions. Under 18 U.S.C. 3148, a person seeking release after conviction must be released on the least restrictive conditions necessary to assure appearance unless the court finds that the person is likely to flee or pose a danger to the community. Only if such a risk of flight or dangerousness is found, or, in the case where release is sought pending appeal, the appeal is found to be frivolous or taken for delay, may the judge deny release.

Like the Task Force, the Department is of the view that there are compelling reasons for abandoning the present standard which presumptively favors post-conviction release:

> "First, conviction, in which the defendant's guilt is established beyond a reasonable doubt, is presumptively correct at law. Therefore, while a statutory presumption in favor of release prior to an adjudication of guilt may be appropriate, it is not appropriate after conviction. Second, the adoption of a liberal release policy for convicted persons, particularly during the pendency of lengthy appeals, undermines the deterrent effect of conviction and erodes the community's confidence in the criminal justice system by permitting convicted criminals to remain free even though their guilt has been established beyond a reasonable doubt." 17/

Thus, the Department joins the Violent Crime Task Force in recommending that the standard for post-conviction release be amended so that, as a general rule, release on bail would not be presumed for convicted persons who are awaiting imposition or execution of sentence or who had been sentenced to a term of imprisonment and were awaiting appeal; rather release would be permitted only in those cases in which the convicted person is able to provide convincing evidence that he will not flee or pose a danger to the community and, if the person is awaiting appeal, that the appeal raises a substantial question of law or fact likely to result in reversal of conviction or an order for a new trial. A similar standard is now incorporated in the release provisions of the District of Columbia Code. 18/

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17/ Attorney General's Task Force on Violent Crime, Washington, D.C., August 17, 1981, at 52. A footnote to this passage referred to the fact that the low rate of reversal of federal criminal convictions -- 10.4% for cases terminated during the twelve month period ending in June 1979 -- gives support to the presumptive validity of criminal convictions in the federal courts.

18/ D.C. Code sec. 23-1325.

5. Government appeal of release decisions.

The Bail Reform Act now specifically provides defendants with opportunities to move for reduction of bond, and to seek reconsideration and review of release decisions. However, the Act does not provide the government any analogous rights to appeal release decisions. Thus, the situation has arisen where, faced with what it believes to be an improper release determination, the government has been powerless to seek review of a hastily made decision which permits the defendant to flee the jurisdiction or to return to the community to commit further crimes.

While we have had some success in arguing that the government is not precluded, in certain cases, from seeking reconsideration of a release order, despite the lack of any specific statutory authority to do so,[19] we believe that as a matter of both sound policy and basic fairness, the government should be given clear statutory authority to appeal release decisions.

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[19] In United States v. Zuccaro, 645 F.2d 104 (2d Cir. 1981), the authority of the government to request that a trial judge amend conditions of release that had been set by another judicial officer was found to be implicitly contemplated by the Bail Reform Act. Zuccaro, who had a long history of arrests for serious crimes, was charged with a hijacking involving the theft of $750,000. The day after his bail was set by a magistrate at $150,000, the government filed a motion with the District Court to increase the amount of bail. The District Court ordered an increase in the amount of bail to $350,000, and the defendant unsuccessfully appealed the validity of the order.

6. Penalties for bail jumping should be more closely proportionate to the penalties for the offense originally charged.

One of the ways in which the law seeks to deter flight to avoid prosecution is by making bail jumping a separate punishable offense (18 U.S.C. 3150). Under current law the maximum penalty for bail jumping is five years' imprisonment if the offense originally charged was a felony, and one year's imprisonment if the offense originally charged was a misdemeanor. However, the bail jumping penalties can effectively serve the goal of deterrence only if they are more closely proportionate to the penalties for the offense with which the defendant was charged when he was released.

Under the present system, the five year penalty for bail jumping may dissuade a defendant charged with an offense punishable by a five or ten year prison sentence from fleeing. But where the penalty for the original offense is in the range of twenty years or above, the present penalty for bail jumping may not be an adequate deterrent to flight, for the defendant may be tempted to go into hiding until the government's case becomes stale and witnesses are unavailable, and then surface to face only the five year penalty for bail jumping rather than the much more severe penalty for the offense originally charged.

Therefore, we urge that the penalties for bail jumping be made more closely proportionate to those for the offense originally charged. This was also a recommendation of the Violent Crime Task Force, and is now included in the bail provisions of the criminal code reform bill.

7. Inquiry into the sources of property used to post bond.

Increasingly, federal prosecutors are faced with the problem of defendants, particularly those engaged in highly lucrative criminal activities, who forfeit large money bonds and flee prosecution. These defendants, who use the proceeds of their illegal activities to post bond or provide collateral for corporate surety bonds, view forfeiture of bond as just another cost of doing business. Indeed, it appears that there is a growing practice among those engaged in large scale criminal activities of setting aside a portion of the proceeds of crime to cover this "cost."

The rationale of the use of money bond as a form of conditional release is that the prospect of forfeiture of the bond can be a sufficient incentive to assure appearance. However, this rationale does not hold true where the proceeds of crime are used to finance the bond and forfeiture is in fact anticipated as the cost of avoiding prosecution. Thus, the source of money or other property used to post bond may be determinative of whether the bond will be an effective means of assuring the defendant's presence at trial.

Presently, there is some question whether the courts have full authority to inquire into the sources used to post bond and to deny bond if they are not satisfied that the source of the property is such that the bond will be effective in assuring the defendant's appearance.20/ Thus, we recommend that the courts

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20/ Rule 46(d) of the Federal Rules of Criminal Procedure permits the courts to require a surety, other than corporate sureties, to file an affadavit listing the property use to secure a bond, and it is likely that this provision authorizes a hearing into the source of property to secure a bond, at least with respect to non-corporate sureties. However, there is no express authority (continued on next page) be given specific statutory authority to inquire into the source of money or other property offered to fulfill financial conditions of release, and to refuse to accept the money or property if it appears that because of its source, it will not reasonably assure the appearance of the defendant at trial.

Many critics of the use of financial conditions of release point to cases in which extremely high money bonds have not prevented high level criminals, especially major narcotics traffickers, from fleeing the country to avoid prosecution as evidence that money bond is an ineffective deterrent to flight. In our view, however, such cases simply demonstrate that money bond cannot assure appearance where it is financed through the proceeds of crime. We believe that financial conditions of release can, in certain cases, assure the appearance of the accused at trial. But if this form of release is to be as effective as we believe it can be, the courts must be given clear authority to determine the source of property used to post bond.

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(footnote continued from previous page) for the courts to make a similar inquiry where the bond is to be provided by a corporate security. Nonetheless, at least two courts have conducted such an inquiry. See, United States v. Melville, 309 F.Supp. 824 (S.D.N.Y. 1970), and United States v. DeMorchena, 330 F.Supp. 1223 (S.D. Cal. 1970).

The provisions of S. 1554.

In our view, S. 1554 represents the kind of comprehensive approach to bail reform that is needed. The bill addresses most of the areas of reform that I have discussed. It recognizes as an appropriate consideration in all release decisions the danger a defendant may pose to community safety. It also provides, in limited circumstances, for pretrial detention, not only codifying the authority now recognized in case law to detain defendants who pose serious flight risks or who seek to threaten and intimidate witnesses and jurors, but also taking the necessary step of providing for detention of defendants who, if released, are likely to engage in further violent or dangerous crimes. It abandons the irrational standard presumptively favoring release of convicted persons, and instead adopts a more stringent standard for post-conviction release like that which we have recommended. It requires all defendants to refrain from criminal activity as a condition of release, and permits temporary detention of a defendant arrested while on a form of conditional release so that there is a reasonable opportunity for the authorities to revoke the defendant's release. It also gives the government statutory authority to appeal release decisions.

We do believe, however, that S. 1554 can be improved and strengthened. In addition, the Department has serious reservations about the propriety of abandoning, as S. 1554 proposes, any use of money bond to assure appearance. Therefore, we suggest the following changes in the bill:

1. Standard for pretrial detention.

The bill sets out the standard for ordering pretrial detention in proposed section 3142(e) of title 18. It provides for detention upon a finding that (1) no condition or combination of conditions will assure the appearance of the person as required and the safety of any other person and the community; and (2) there is a substantial probability that the person has committed the offense for which he has been charged. As I noted earlier, we believe that the government as a general rule should be required to establish the facts indicating the dangerousness of a defendant by clear and convincing evidence before pretrial release may be denied on this basis. However, we do not believe that the government should be required to make such a showing where the defendant has previously been convicted of a serious crime which was committed while he was on pretrial release. In our view, such defendants may be presumed to be dangerous, at least if the previous conviction occurred within the last five years.

Our second concern with S. 1554's standard for pretrial detention is that it requires the government to establish a "substantial probability" that the person committed the offense with which he is charged. This is the standard currently in the D.C. Code and has been construed by the District of Columbia Court of Appeals in United States v. Edwards, supra, as being "higher than probable cause" and "equivalent to the standard required to secure a civil injunction" (slip op. p. 38). The Edwards opinion, however, strongly suggests that probable cause -- a standard consistently sustained by the Supreme Court as the basis for "significant restraints on liberty" (Ibid.) -- is a constitutionally sufficient standard, and we believe that the "substantial probability" factor should be eliminated as needlessly burdensome. In our view,a better balance between the defendant's interest in pretrial freedom and the public's interest in protecting the community is struck by requiring probable cause to believe that the defendant committed the crime with which he is charged, coupled with proof by clear and convincing evidence of the facts relied on to conclude that he poses a danger to other persons or the community.

At the initial appearance before a magistrate, the point at which the release determination is to be made, the defendant either appears by virtue of an arrest warrant or a summons which must, under Rule 4(a) of the Federal Rules of Criminal Procedure, be supported by a judicial finding that there is probable cause to believe a crime has been committed and that the defendant committed the crime, or if no warrant has been issued at the time of the defendant's initial appearance, Rule 5(a) requires the filing of a complaint that complies with the probable cause requirements of Rule 4(a). Thus, at the time of bail hearing, the validity of the charges against the defendant will have already been scrutinized. Furthermore, the issue of probable cause will again be examined in the course of a preliminary hearing or the filing of an indictment.

Our objections to the "substantial probability" requirement stem not only from the view that the probable cause requirements of current law are sufficient to assure the validity of the charges against the defendant and to support in appropriate cases a determination to deny release, but also from the practical problems entailed in coming forward with the additional evidence necessary to meet this standard, particularly in those cases in which arrest is not preceded by a full investigation or lengthy grand jury proceedings. Unless a case is fully developed, it may be impossible in the short period of time within which the detention hearing must be held to muster the additional evidence necessary to meet this standard in light of the devotion of time and manpower required in such an effort. In our experience and discussions with prosecutors in the District of Columbia, these difficulties in meeting the analogous requirement under the District of Columbia's pretrial detention statute were cited as a principal reason for the prosecutors' failure to request a pretrial detention hearing, as required under that statute, for most of the last ten years.

Thus, we recommend the deletion of the requirement that the government demonstrate a "substantial probability" that the defendant committed the crime with which he is charged before detention may be ordered. 21/

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21/ We note that, in any event, owing to an apparent drafting error which has been corrected in the comparable provisions of the Federal Criminal Code bill, S. 1630, the "substantial probability" requirement in S. 1554 has been applied not only in cases which detention is sought on the basis of dangerousness, but also in cases in which the basis for detention is risk of flight or the obstruction of justice involving threats to, or intimidation of, witnesses or jurors, contrary to logic and present law.

2. Standard for temporary detention to permit revocation of conditional release.

Proposed section 3124(d) of title 18 permits the temporary detention of a defendant who has committed a crime while on a form of conditional release. The purpose of this section is to permit the defendant to be held in custody for a short period of time while the original releasing authorities can be notified of his arrest and take appropriate action to revoke his release. However, this section of the bill permits temporary detention of such defendants only if the court finds that "no condition or combination of conditions of release will reasonably assure the appearance of the person as required and the safety of any other person and the community." This is essentially the same finding that is required to support pretrial detention on the basis of dangerousness or flight risk under proposed section 3142(e).

In light of the class of defendants to which this temporary detention provision applies -- those arrested while on release, probation, or parole -- we believe that a less stringent standard is appropriate. For example, in the analogous temporary detention provisions of the D.C. Code and the criminal code revision bill, S. 1630, the court need only find that the defendant "may flee or pose a danger ..." We urge that this same standard be incorporated in S. 1554.

3. Penalties for failure to appear.

Proposed section 3146 of the bill incorporates the current penalties for bail jumping: up to five years' imprisonment where the originally charged offense was a felony, and up to one year's imprisonment where the originally charged offense was a misdemeanor. As I discussed earlier, we advocate that the penalties for bail jumping more closely parallel the penalties for the offense with which the defendant was charged when released. It is our view that this reform would make the prospect of prosecution for bail jumping a more effective disincentive for failure to appear.

4. Revocation of release.

Revocation of release is one of the sanctions for a violation of a condition of release permitted under proposed section 3148 of the bill. We believe that this is a particularly appropriate sanction where the condition violated is the mandatory condition provided in sections 3142(b) and (c)(1) that the defendant not commit another crime during the period of his release. However, S. 1554 would permit the imposition of this sanction only if it is determined in the revocation hearing that there is no form of conditional release that will assure the appearance of the defendant or community safety, and that the person is unlikely to abide by the conditions of his release.

We strongly recommend that section 3148 be amended so that revocation of release is required where there is a probable cause finding that the defendant violated the condition that he not commit an offense while on release.

5. Abandoning the use of money bond.

Under current law, a defendant may be required, in order to obtain release, to post either a ten percent appearance bond, or to execute a bail bond secured by the pledge of solvent sureties or the deposit of cash. S. 1554 proposes the novel concept of abandoning the use of money bond,[22] an approach about which the Department has serious reservations.

As we understand it, the principal rationale advanced in support of abandoning the use of financial conditions of release is that as long as judges have the option of requiring the posting of money bond, they will continue to use excessively high bonds as a means of detaining defendants who are poor bail risks, because of their desire to circumvent the time-consuming procedural safeguards that would be a necessary part of a pretrial detention proceeding. While we agree that requiring unreasonably high money bonds as a shortcut method of achieving detention is improper, we do not believe that the concern that judges may misuse the money bond condition justifies the drastic remedy of eliminating money bond altogether.

Historically, money bond has been one of the primary methods of assuring appearance at trial, and we believe that for many defendants it has been and remains a highly effective deterrent to flight, for example when the money posted belongs to a parent or close relative of the accused. Furthermore, we believe that the effectiveness of money bond in assuring appearance can be greatly enhanced if, as we have suggested, the courts are given clear authority to inquire into the source of funds being posted. On the other hand, we are unaware of any basis for concluding that the judges would continue to achieve pretrial detention through use of high money bond if they were able to achieve this purpose directly.

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[22] The bill would permit the imposition of a condition that a defendant agree to forfeit designated property if he fails to appear. While this provision is related to money bond, we do not believe it is an adequate substitute.

In short, although the money bond condition could be used to circumvent detention procedures, it seems an excessive reaction to abolish it altogether in the face of experience and logic indicating that it can be an effective tool for assuring the appearance of some defendants. Moreover, the extent of abuse may well decline once federal judges are presented with a lawful alternative procedure -- preventive detention -- for considering dangerousness.[23]

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[23] We are aware of the suggestions of some in this regard that if money bond is retained, there should be a provision that insures that no such bond may be fixed in an amount beyond a defendant's "ability to pay". The problem with this suggestion, unobjectionable in theory, is that it would embroil the courts in lengthy, collateral pretrial hearings devoted to the extent of the defendant's (and his family's and friends') financial resources. We do not believe that the concern as to potential misuse of money bond warrants so onerous a solution.

We are also aware of the suggestion that surety bond be abolished, as has been recommended by, among others, the American Bar Association in Standard 10-1.3(c) of the Standards on Pretrial Release. The main argument for abolition advanced by the ABA is that the use of a bond in which the defendant posts, for example, 10 percent of the bond with the court, rather than with a surety, places the financial burden of absconding on the defendant, where it logically belongs, rather than on a surety. We are studying the question whether to recommend abolition of surety bond in the context of the federal criminal justice system but as yet have come to no conclusion on it.

6. Inquiry into the source of funds used to post bond.

Some of the criticism of the money bond system is based on an assessment that it is an ineffective method of assuring appearance. In our experience, the prospect of forfeiting bond is an inadequate deterrent of flight only when the amount of bond is too low -- a problem that can be addressed by providing, as does S. 1554, the government with a right to appeal conditions of release -- or when the funds used to secure release are the proceeds of criminal activity -- a problem that we suggest can be cured by adopting the recommendation of permitting the courts to inquire into the source of property used to post bond.

Permitting the courts to inquire into the source of property used to secure release is necessary whenever the prospect of forfeiture of property is intended to assure appearance. Thus, whether the Subcommittee decides to retain money bond, or decides to adopt the present structure of S. 1554 which includes among the forms of conditional release a provision that the defendant agree to forfeit designated property if he fails to appear, the Department recommends that the bill include a provision for a hearing into the source of the property offered as the means of securing release.

Mr. Chairman, that completes my statement, and at this time I would be pleased to try to answer any questions that you or other members of the Subcommittee may have.

Mr. **Rader**. Pursuant to Chairman Hatch's direction, our next witness this afternoon will be Mr. Jerry Watson. He will represent the Professional Bondsmen of the United States, a large association of professional bondsmen comprised of over 5,000 bondsmen nationwide.

Jerry Watson is an attorney from Dallas, Tex., and Los Angeles, Calif. For the past 12 years he has represented insurance companies in the business of serving as corporate sureties on bail bonds. The subcommittee is very pleased to welcome an individual with a great deal of personal experience in handling the legal implications of bail bonds.

Mr. Watson?

## STATEMENT OF JERRY WATSON, ESQ., PROFESSIONAL BONDSMEN OF THE UNITED STATES

Mr. **Watson**. Thank you, Mr. Rader.

On behalf of my clients, I want to express to the committee my appreciation for being asked to come and appear as a witness. I know that you are only hearing three witnesses today. The fact that I was selected as one of them is indeed a rare privilege, and I appreciate it.

I was very interested in Mr. Jeffrey Harris' remarks concerning maintaining money bail as a part of the system on Federal cases. I am not really sure that I can state my position as well as he has already done it for me. Perhaps if my clients had known ahead of time what he was going to say, I might not have been here.

It is nice to have this rare opportunity to be on the same side with the Government on a bail bond issue. I hope that the many years that I have spent representing insurance companies who write bail across the country will enable me to offer some information that perhaps will be of some help to the subcommittee.

I will be talking mostly about what I consider to be the practical effects that would be produced if S. 1554 were enacted. I am more familiar with what those effects would be on the street and in the county courthouses and in the Federal courts around the country.

In the interest of time, if you will indulge me, I am going to read my statement.

Taking, therefore, the pragmatic and empirical viewpoint as opposed to the academic or purely philosophical, my address is going to be very brief and to the point. I think everybody interested in this bill can certainly agree that the supreme test of any program is just very simply whether or not it will work. I submit that there is one portion of the bill that is very highly unworkable, and it is mainly to that portion of the bill that I want to make my address.

S. 1554 intends to reduce danger to the community. It assumes the falsehood that elimination of surety bonds will help achieve that end. The truth is that disallowing surety bonds is the very most certain way to defeat the high purpose of the bill and its sponsors.

This is true for several reasons. Before a surety agent—who has been appointed by an insurance company and who has been duly licensed by some State authority—before that surety agent writes a bond in favor of the U.S. Government, he obtains exhaustive information on the accused, on his relatives and those persons close to him.

If the accused is a transient or if he is unemployed, the agent will generally not even write the bond. He secures the bond by having something of value pledged as security, and he will go to third persons and have them execute agreements of indemnity to hold him harmless in the event there is a skip on the bond.

The agent will run very tight control on the accused. He will insist, for example, among other things, that the accused check in with him at least on a weekly basis, on the same day of each week and the same time each day. He keeps check-in cards on this man. If the man ever fails to check in, he will go immediately with a recovery agent, find the man, bring him back to the court, file an affidavit to go off the bond, and seek the granting of a motion to be relieved as surety on the bond.

He full well tells the accused this before he ever takes him out of jail. He advises him that if he does not meet the conditions upon which he is taken out of jail by the bondsman, that he is going to go back into jail. Therefore, he monitors the case of the accused and he insists that the accused at all times be represented by counsel, and he works closely with the counsel for the accused.

He notifies the accused of all of his court dates and he takes steps to assure that all court appearances are made. If despite all of this the accused does not appear as directed, the surety agent goes to great lengths and pays all expenses necessary to retrieve the accused and arrange for his surrender to proper authorities.

The surety agent knows full well that all of these steps are necessary to prevent his having to pay to the United States the full amount of the bond, should it go forfeit. The incentive for diligence is therefore quite sufficient.

It is, therefore, also highly unlikely that a person released on a surety bond will not appear as instructed. If he does not so appear, it is even more unlikely that he will not be recaptured to ultimately stand trial.

I was just handed this morning an interesting copy of an article. In Florida they have recently had a legislative criminal justice committee hearing to determine whether or not money bail should be done away with or surety bonds should be eliminated from their system.

One of the persons appearing to give testimony to that committee was a Judge Harry Lee Coe, and the article says, "Judge Coe warned that unless a 'huge bureaucracy' replaced the role of the bondsman, the criminal justice system would break down." He said that the bondsmen are ingenious in finding defendants and getting them to court, and that is what we are after. He says further that the bondsman does play a vital role in getting them there. Other judges gave similar testimony to that committee.

The alternatives to surety bonds as proposed by S. 1554 are basically threefold. Mr. Harris has laid them out very well for you already, so I will just mention them very, very briefly.

The first thing the judicial officer—be he magistrate or Federal district court judge—can do is, he can release the accused on his own personal recognizance. If the man, in terms of character and background and community standing, qualifies for such release based on his promise to reappear, who can argue with that? We certainly have no qualms, none of my clients do, with that position.

Second, the judicial officer has the alternative of temporarily or permanently detaining the man. Mr. Harris has also spoken well to the subject of whether or not that meets eighth amendment tests and whether or not it is constitutional. Under *United States* v. *Edwards* there seems to be some precedent in that area.

I think it is an interesting situation, and I know that the Supreme Court in dicta in several cases has gone both ways on the issue. I know that there are cases where they have indicated in dicta that Congress does not have the power to set a class of persons who shall not be bailable in noncapital cases, and then dicta in other cases seems to indicate that they can. I think it will certainly be tried by the Supreme Court some day, and it will be interesting.

Concerning my clients' position on that, and I represent a number of insurance companies, I have polled my clients and I have asked them, "How do you feel about this?" If the judge can permanently detain pending trial someone whom he feels is going to be a danger to the community, it is going to cost my clients a great deal of money because if bonds were set in these cases, the judge would normally set a large bond due to the character of the defendant.

Without exception, my clients have been delighted with this provision of the bill. We all hope that this part of the bill will remain in the bill and that it will in fact be attempted, and that judges will in fact be able to consider not only whether or not the accused will reappear as directed but whether or not he might harm persons in the community.

If the judge does consider that he would be harmful to the community, then the judge will not set bail and he will detain the person pending trial. We sincerely hope that this is the case.

The third thing that the judge can do or the judicial officer can do—and this is the one with which I have some serious misgivings—he can release the prisoner "on conditions." This provision is the bill's true alternative to surety bonds. It provides that if a person cannot qualify for release on his own personal recognizance but at the same time is not so apparently incorrigible as to warrant his being permanently detained, then that person may be released "on conditions." The conditions are numerous, and many of them are not really unlike the controls imposed by a surety agent who secures the release of the accused on a surety bond.

Now I have made a flat statement here, and I have to read it, and yet I want to qualify it just a bit. I have made this statement. I have said: "This program will not work. It has been tried over and over. In most cases it has failed utterly." Conditional release programs have some very poor statistics.

In California a couple of years ago the State legislature passed Assembly bill No. 2. The purpose of A.B. 2 was to do away with surety bail on all misdemeanor cases. Every misdemeanor defendant in California is released "on conditions." OK? Sixty-six percent of those people never showed up for court. There is nobody to go get them.

In Houston, Tex., the effects of their pretrial release program have been chaotic. Few programs of this nature with which I am familiar anywhere in the country have good statistics and good records.

I do want to say this in fairness to the next witness: I have been told since I have been in the Capital that the Washington, D.C., pretrial release agency program is very efficiently administered, and that the gentleman who is in charge of it is a very capable and able administrator, and that the program is much needed here, and that the program works well. I do not have any data on the program as far as skip-tracing. I do not have any data on the program as far as how many of the defendants on their pretrial release bonds do not show up for trial. In fairness, I wanted to mention that.

In Dallas, Tex., we were told that 1.3 percent of all those persons released on pretrial release bonds or conditional release bonds in Dallas, Tex., only 1.3 percent failed to make their court appearances. Those statistics were just too good, and so some of my clients paid persons to go to the court files themselves and check the records to get the true stats. It turned out to be over 60 percent who do not show up for trial.

This needs to be compared with the number of persons who are released on surety bonds who do not come back as they are directed and stand trial. That statistic is only 2 percent. Only 2 percent do not show up, and of those 2 percent, 50 percent are subsequently recovered and brought to trial. Therefore, you are basically looking at a 1 percent no trial stat on persons released on a surety bond as opposed to over 50 percent of those who are released on conditional release bonds.

Such a program inevitably seems to produce administrative nightmares. When persons on a pretrial release bond do not appear for trial, who goes after them? Most of the time, nobody does. Hundreds of thousands of warrants already go unserved in our country for lack of budget and personnel. Any marshal or sheriff will verify this.

When a conditional release bond is written and then forfeited, who pays? Nobody pays. I think the interesting question is, who will be responsible to assure that all of these conditions imposed upon the accused are met? If we are going to allow the judicial officer to let this man out on any of these 16 conditions, and the bill provides that he can put other conditions in if he desires, who is going to see that those conditions are kept?

I think this can best be answered from the words in a statement of the Honorable James C. Anders, solicitor of the Fifth Judicial Circuit, who has already appeared before you in favor of S. 1554. He said, and I quote, "* * * the administrative and supervisory problems encountered when attempts are made to insure compliance with such conditions are nearly insurmountable."

Therefore, not wanting to be facetious, I do want to say that there is one group of persons whom I believe will find great room for rejoicing in this bill, and that is the members of the criminal community, because those people know that if they can secure one of these conditional release bonds they do not have to go to court, and if they do not go to court they know that nobody is coming after them. This has proven to be the case, over and over and over and over again, and it is basically what the bill is calling for.

Second, I have problems with the bill because it proposes to do away with surety bonds and surety bonds have proven to be economically very, very feasible. All of the services performed by the corporate surety and their agents are at no expense to the Government. There are over 15,000 insurance agents in America who write surety bonds.

Each of those—we did a survey—each of those agents has over four employees in his office. There are 60,000 people in the private sector today doing what this portion of the bill says the Government could be doing. I do not want to get into any free enterprise arguments but we are basically talking about putting an awful lot of people out of business. They are people who are performing a service.

Senator HATCH. In your statement you make some good points, I think, about how either the private sector pays for it or you can escalate the public sector and have more bureaucracy. I think I have your second point here.

Mr. WATSON. OK, sir.

Senator HATCH. Could you make your conclusion and then let me ask you a couple of questions?

Mr. WATSON. Yes, sir.

Senator, I will not even read my conclusion.

Senator HATCH. OK.

Mr. WATSON. I will just say that we have done some calculating, and based upon available data to hand I have made what I consider to be a conservative estimate of what this bill is going to cost the taxpayers. It is going to cost the taxpayers upwards toward $100 million per year.

Senator HATCH. You consider that a conservative estimate?

Mr. WATSON. I consider it a very conservative estimate because over $50 million a year is being collected by the Federal courts in forfeitures on Federal bonds written by sureties now.

Senator HATCH. At the outset I would like to ask you the same question that we posed earlier to the Justice Department: If a surety shows up at a courtroom and learns for the first time that the suspect is not present, the current law would possibly result only in the bond being forfeited. Should the law allow a court the discretion of postponing the forfeiture date on the bond for a few days to allow the surety to bring the fugitive into court? Do you think in most instances that this would give the surety some incentive to find the defendant on his own?

Mr. WATSON. Mr. Chairman, it certainly would provide the surety with some incentive to go and get the defendant and retrieve him and bring him back but I think there is a better way to handle that problem. We have proposed an amendment to this bill. The amendment would call for a statutory remittance of a portion of what the surety had paid on the forfeiture if the surety retrieves the defendant and brings him back within a certain timeframe.

I think it would actually work better, rather than to give some time in there, I think it would actually work better——

Senator HATCH. That sounds like a good amendment.

Mr. WATSON. Yes, sir. Just go ahead and forfeit the bond when the man is due to appear, and if he fails to appear, the bailiff calls his name three times and if he does not show up, forfeit the bond. The Government—except for one case that I tried about 3 weeks ago in Los Angeles, it took the Government over 2 years to move for judgment on a $100,000 bail bond forfeiture of one of my clients—but usually on a large bond the district attorney's office will move for final judgment very quickly. Most Federal courts want the money within 10 days after judgment.

One other thing along those lines, and perhaps you are aware of this and perhaps you are not: The incentive for the surety to pay the Federal bond when the court wants the money is that if the surety does not pay the Federal bond when the court wants the money, the surety's name automatically is stricken from the Federal Treasury list and they can no longer write Federal bonds.

Consequently, I think the better practice would be to let the judge forfeit the bond, let the Government move immediately for judgment, have a show-cause hearing as to why the forfeiture should not become a final judgment, and then within 10 days after judgment make the surety pay but give the surety a guaranteed remittance if they go get that man and bring him back.

Senator HATCH. Sure.

Prof. Dan Freed of Yale Unversity Law School gave the subcommittee what we thought was some very valuable testimony last month. He basically stated that some of the difficulties with the current money bail practices, one of the difficulties with the current money bail practices is that the traditional concept of surety has changed.

He noted that early in our history a surety served without pay and vouched for the character of the defendant, and affirmed that he would see that the defendant stood trial. This surety was usually a family member who could control to some degree the behavior of the suspect. In other words, the surety stood to gain nothing and to lose everything. Therefore, he monitored carefully the activities of the suspect. Today, however, he says that the bondsman is paid and does not even know the suspect.

Do you feel that the law should contain some kind of a provision to ensure that today's bondsmen exercise the same degree of care shown by the classical surety? For instance, should the surety be required to forfeit a portion of his bond if the suspect commits another crime while in his care?

Mr. WATSON. I understand there to be two questions within the question, Senator.

Senator HATCH. Right.

Mr. WATSON. The first one, I think Professor Freed—and I respect his judgment and I know that he is well researched—I think he has answered the question for me because he says that in the early days of classical surety relationships this was generally a blood relative. The bondsman does not have that distinct advantage in controlling the behavior of the accused while he is out awaiting trial.

As to whether or not the bondsman should be made or the corporate surety should be made to forfeit a portion of the face amount of the bond in the event that the accused becomes a recidivist, no, sir, I do not think so. The reason I do not think so is because it would become so financially prohibitive that there just would not be any more corporate surety business.

Senator HATCH. I see.

I have a number of other questions I would like to submit to you in writing and have you answer them in writing, if you will.

Mr. WATSON. That will be just fine, Senator.

Senator HATCH. If you could do that within a week, I would appreciate it.

Mr. WATSON. I will be glad to do it. I do have a couple of bits of data here that I would like to give to the reporter so that they can be made a part of the permanent record.

Senator HATCH. Without objection, we will make them part of the record.

Mr. WATSON. Thank you very much.

Senator HATCH. OK.

Mr. WATSON. Thank you, sir.

Senator HATCH. Thank you.

[The prepared statement of Jerry Watson follows:]

## PREPARED STATEMENT OF JERRY WATSON

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to submit for your consideration this statement in opposition to S. 1554.

My name is Jerry W. Watson. I am an attorney from Dallas, Texas and Los Angeles, California, and I am submitting this statement in behalf of:

Professional Bondsmen of The U.S., an Association,
Allegheny Mutual Casualty Company of Pennsylvania,
International Fidelity Insurance Company of New Jersey,
Accredited Surety And Casualty Company of Florida, and
Indemnity Insurance Company of North America of Pennsylvania.

For the past twelve years I have represented insurance companies across America who are in the business of serving as corporate sureties on bail bonds. I also represent many insurance agents in the bonding industry as well as State-wide and National Associations of such agents. I have served as counsel for these parties before various governmental bodies including the U.S. Treasury Department, The Federal Trade Commission, many State Insurance Boards and numerous Federal and State Courts.

I believe my background qualifies me to speak to the actual effects that would result from the passage of S. 1554 as drafted. Having read with interest the statements of others who have appeared before you on this matter, I think my statement might be unique in this respect.

Taking, therefore, the pragmatic and empirical viewpoint, as opposed to the academic or philosophical, my address will be very brief and to the point. It is as follows:

S. 1554 intends to reduce danger to the community. It assumes the falsehood that elimination of Surety bonds will help. The truth is that disallowing Surety bonds is the very most certain way to defeat the high purpose of the Bill and its sponsers.

This is true for several reasons, and the reasons are:

## I. SURETY BONDS WILL WORK. THE S. 1554 ALTERNATIVE WILL NOT.

### A. SURETY BONDS.

Before a Surety agent writes a bond in favor of the U.S. he obtains exhaustive information on the accused, his relatives and those close to him. If the accused is a transient or unemployed, the bond would not generally be written. He secures the bond by having something of value pledged as security, and he has third persons execute agreements of indemnity. He runs very tight control on the accused, insisting among other things on regular personal check-ins. He monitors the case of the accused, and he insists that the accused be at all times represented by counsel. He notifies the accused of all his Court dates, and takes steps to assure that all appearances are made.

If, despite all this, the accused does not appear as directed, the Surety agent goes to great lengths and pays all expenses necessary to retrieve the accused and arrange for his surrender to the proper authorities.

The Surety agent knows full well that all these steps are necessary to prevent his having to pay to the U.S. the full amount of the bond should it go forfeit. The incentive for diligence is quite sufficient.

It is therefore highly unlikely that a person released on a Surety bond will not appear as instructed. If he does not so appear, it is even more unlikely that he will not be recaptured to ultimately stand trial.

## B. THE ALTERNATIVES OF S. 1554.

There are three, and they are:

### 1. Personal Recognizance Release.

Who can argue with releasing a person on their own word that they will appear as directed, so long as their background and character qualifies them for such trust?

### 2. Temporary or Permanent Detention.

While these provisions of the Bill might divest an accused of his Eighth Amendment rights (dicta in some U.S. Supreme Court cases suggest that Congress has no discretion to determine whether persons or classes of persons may be admitted to bail), that point, while interesting, is not the purpose of my statement and it is therefore best left to the experts in Constitutional Law.

### 3. Release On Conditions.

This provision is the Bill's true alternative to Surety bonds. It provides that if a person cannot qualify for release on his own personal recognizance but at the same time is not so apparently incorrigible as to warrant his being permanently detained, then that person may be released "on conditions". The "conditions" are numerous and many of them are not unlike the controls imposed by the Surety agent who secures the release of the accused on a Surety bond.

This program will not work. It has been tried, over and over. It has always failed utterly. In Los Angeles, California over sixty six (66) per cent of those released under a similar program failed to appear for trial. In Houston, Texas the effects of their Pre-Trial Release program have been chaotic. No such program anywhere can boast of success.

Such a program inevitably produces administrative nightmares. When persons on a Pre-Trial Release bond no not appear for trial, who goes after them? No one. Hundreds of thousands of warrants already go unserved in our country for lack of budget and personnel. Any Marshall or Sheriff will verify this. When such a bond as this is forfeited, who pays? No one. Who will be responsible to assure that the conditions imposed upon the accused are met? This can best be answered from words in the statement of Hon. James C. Anders, Solicitor of the Fifth Judicial Circuit, who has appeared before you in favor of S. 1554.

> "... the administrative and supervisory problems encountered when attempts are made to insure compliance with such conditions are nearly insurmountable."

## II. SURETY BONDS ARE ECONOMICALLY FEASIBLE. THE S. 1554 ALTERNATIVE IS NOT.

### A. SURETY BONDS.

All the services performed by the corporate Surety and their agents are at no expense to the government. That enormous work load as described in Paragraph I.A. of this statement is accomplished at absolutely no cost to the government or the tax payer. Just one of the organizations in whose behalf I offer this statement is affiliated with over five thousand Surety agents, and these agents have several employees each. There are therefore many thousands of persons in the private sector already doing that which is sought to be accomplished by S. 1554 and its Pre-Trial Release alternative.

B. THE S. 1554 ALTERNATIVE.

Again, Pre-Trial Release as opposed to Surety bonds is not a novel concept. It has been attempted. The administrative costs have been astonishing. For example, just witness the Washington, D.C. program alone. Their Pre-Trial Release Agency started in 1967 with four persons and an annual budget of $75,000.00. The current program requires forty full time staff, six part time staff and six volunteer students with a 1981 budget of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00). This escalation is reflective of such agencies all across the nation. This data can be verified by checking with:

Pre-Trial Services Resources Center
918 F Street, Northwest
Suite 500
Washington, D.C.

(202) 638-3080

These administrative costs to the government are not to mention the additional loss in revenue to be experienced under the alternative plan. Whenever a Pre-Trial Release bond is forfeited no one pays. Millions of Dollars in judgments taken on these forfeitures are uncollectible. Whenever a Surety bond is forfeited, that judgment must either be paid or the defaulting Surety loses its privilege of doing business.

It is without jest that I say that S. 1554 as drawn is tantamount to putting the government into the bail bond business, and it has already been established that should that come to pass on a national level it will be a very costly maneuver indeed.

CONCLUSION.

If implementing a "conditional release" approach and eliminating Surety bonds is so predestined to failure as the preceding seven pages suggest, why would it have been proposed by the sponsers of S. 1554 in the first place?

I believe the answer is very simple. The proponents of the Bill want to make our communities safer places in which to live and raise our children. Not one among us would decry such a desire. Then they assign at least part of our problem with crime to recidivism. This also seems valid, though the statistics vary. It is at this point that the fallacy enters which accounts for the drafting and sponsorship of the Bill. The error is this: having determined that the problem is recidivism, it is immediately presumed that those who are charged with a crime, released, and then commit another offense before being tried on the first case are exclusively persons who have been released on a Surety bond. This is not true. The assumption that recidivists are a class of persons who are on a Surety bond at the time of commission of their "later offense" is based upon false or ommitted data.

In fact, just the converse seems to be the case. The far greater number of those persons who return to their criminal habits after release on bond come from the ranks of the "free bondees" or those released through Pre-Trial Release facilities. Much more control is run upon the accused who is released on a Surety bond.

In other words, S. 1554 has selected the wrong target. The Surety Bond approach should be strengthened, rather than eliminated.

There is an amendment to S. 1554 which would provide the Surety even more incentive to retrieve the non-appearing accused by providing partial remittitur upon reincarceration. This would penalize the "down statistic" (the fleeing accused) and reward the "up statistic" (the diligent Surety), and no other approach will produce optimum results.

I urge you to reject S. 1554 as drafted and to approve it as amended (copy of amendment attached for your consideration), as I am positive it will be to the benfit of us all.

Senator HATCH. As our last witness this afternoon we welcome Mr. Bruce Beaudin, director since 1968 of the D.C. Pretrial Services Agency. He is also presently chairman of the board of trustees for the Pretrial Services Resource Center, and cochairman of the advisory board of the National Association of Pretrial Services Agencies.

Mr. Beaudin graduated from Georgetown Law School in 1964 and for the next 4 years served as the staff attorney and director of the Public Defender Service for the District of Columbia. With 17 years' experience, and as someone concerned about the several problems posed by the release of certain defendants, of course the subcommittee welcomes the remarks of Mr. Beaudin here today.

Mr. BEAUDIN. Thank you, Mr. Chairman.

Senator HATCH. Mr. Beaudin, if you could limit yourself to about 10 minutes it will allow me some time for some questions.

## STATEMENT OF BRUCE D. BEAUDIN, ESQ., DIRECTOR, D.C. PRETRIAL SERVICES AGENCY

Mr. BEAUDIN. Yes, sir, I will be happy to. With your permission, you have seen that I have submitted a statement, I would just ask you that that be reproduced.

Senator HATCH. Without objection, it will be made a part of the record.

Mr. BEAUDIN. I would like to make nine points and I hope I can confine them to a minute apiece.

### ELIMINATION OF MONEY BAIL

One, the principal benefit of this bill is to call for the elimination of money bail. The Attorney General's office, through Jeff Harris, agrees as you heard that it is improper for judges to use money bail to detain people that they feel are dangerous.

What this bill does is permit judges to consider that danger and in fact detain them. If money bail is put back in—the point at which Mr. Harris and I depart—we will once again have abuse. I know why the U.S. attorney has not used the detention statute in the District of Columbia more than 20 times in the last 11 years. It is because he can obtain the detention of defendants with high money bail without having to go through the procedures required under the detention statute.

### THE ISSUE OF SUBSTANTIAL PROBABILITY

There are many instances I could cite that show how the absence of a standard for determining the strength of the present charge, that is, the substantial probability issue that Mr. Harris raised, has resulted in abuse. If that substantial probability issue had been addressed defendants would not have been held on high money bond. Many defendants jailed pretrial in this manner have ultimately been found to have had nothing to do with the offenses charged. The hearings and standards made explicit in this bill will eliminate these situations and I commend the committee.

Therefore, the reasons for the substantial probability in your bill are justified reasons. In the event that a court is going to detain somebody on the basis of prediction, there ought to be something more than somebody's hunch that this crime may result in a conviction.

### UNCLEAN SOURCE

The third point that I would make is the point that Mr. Harris made on the uncleanliness of the source of the money being used to post bond issue, and what kind of an administrative burden that might pose. If we eliminate the issue of money altogether, you do not have to worry about that kind of a hearing. If a judge simply has to make a single decision—Should this person be in jail to protect the community or should he be out?—he does not then have to make a second decision which is, how much money do I have to use to accomplish that?

We have proved since 1960, in data that can be gotten from the Pretrial Services Resource Center, in programs such as the ones in Salt Lake City, in the District of Columbia, in New York, and in many other jurisdictions that alternatives to the money bail system are as effective at producing people in court as if not more effective than, the money that you will get back if you post some financial condition or that you never recover in the case of surety release.

### SURETY VERSUS OTHER FINANCIAL CONDITIONS

As my fourth point I should caution the committee to look carefully at the distinction between financial conditions and surety bail. When a surety bond is set, a bondsman then decides—not a judge—a bondsman decides whether or not a defendant will be released. It does not become the decision of a judicial officer. The officer has said, "It requires this amount of bail." A bondsman can decide he does not want to take this defendant, and the defendant has no right to secure his release.

I do not think that Mr. Watson can be entirely candid when he says that he is on the same side, that he takes the same position on this bill as the U.S. Department of Justice. Just because the U.S. Department of Justice spoke in terms of financial conditions, does not mean it advocates the continued use of surety bail.

### CLARIFICATION OF PROPERTY OPTION

The fifth point that I would like to make is a very minor point. In section 3142(c)(2)(k) where there is a provision that one of the conditions of release might be a property release, it is my understanding that that section refers to property rather than money. I would hope that because of the other exclusionary section which says money is not one of the conditions that can be used, that the property referred to here would be property over which the defendant has some control. This interpretation assumes that it is in fact in the defendant's possession, as distinguished from some mythical piece of property that might be required of a defendant which he does not even own or have access to.

### BIFURCATED APPROACH: FLIGHT VERSUS DANGER

The sixth point that I would make is that I think that one of the things that the bill might do, not necessarily in its language but in the legislative history, is to consider a bifurcated approach to the setting of bail. In other words, we are concerned about danger to the community and we are concerned about whether a defendant will appear.

Those are two very clear and distinct issues, and yet if they are combined at a hearing, there is no way for either the Government or the defendant to challenge the determination as to whether or not this particular condition was set because the defendant posed a threat of flight or the defendant posed a threat of danger to the community.

I think that one of the things that could strengthen the bill would be the requirement of a finding that there is a problem here with flight and we will do this about it, or there is a problem here with danger and we will do that about it.

### SUBSTANTIAL PROBABILITY: A DUE PROCESS ISSUE

Point number seven, I have already referred to the substantial probability issue previously but we should consider that the *Edwards* opinion talked about due process and substantial probability. The conclusion in the 7 to 2 Court was that the statute as written, requiring substantial probability, certainly required more than probable cause, although that probable cause could be established by proffer. It is not as burdensome, I do not think, as Mr. Harris would have the committee believe. At the same time the standard is difinitely higher than the probable cause a policeman needs to make an arrest and the *Edwards* court clearly said so.

What has been approved as a constitutionally permissible standard by the only court that has considered it, is that substantial probability does pass muster. I do not think that in attempting to fashion a new bill that would cover the Federal system, that in light of the fact that the Supreme Court has not yet decided whether to accept certiorari or not on the *Edwards* case, that we ought to take further inroads.

### ALTERNATIVES

Point number eight, on the alternatives issue, that is alternatives to money bail, as to whether or not they are sufficient, the Department of Justice last year cited the Pretrial Services Agency as an exemplary program. What that means is that like the career criminal program started by the Department of Justice and many States' attorneys offices, this was one of 35 out of 630 over the last 8 years that have been considered by the Department of Justice to be the kinds of programs that should serve as models both in the Federal system and in State systems.

The thing that makes the D.C. program worth anything as far as I am concerned, is that if it has proved one thing it has proved that the alternatives to surety bail work because in fact we do not have too much surety bail left in the District of Columbia. The reason that we do not, and the reason that we do not have any in Kentucky and any in Illinois and any in Philadelphia is that the alternatives have been proved to bring people to court and not to result in more crime than the alternatives available as surety releases in other sections of the country.

### COST IMPLICATIONS

Finally, as my ninth point, I would like to address the cost issue. Mr. Watson said that this program would cost, if implemented, $100 million. According to the Bureau of Justice Statistics' last report on prison and jail overcrowding, today it would cost at—$50,000 a cell which is a conservative estimate—more than $250 million to build cells that would hold people presently in detention.

The use of alternative programs, if they cost $100 million, would save $150 million, so I would suggest that the notion of what the program will cost should not be considered in a vacuum, and that it should be considered against what it will cost this country if the program is not put into effect.

### CONCLUSION

I commend this committee for having the guts to tackle a bill like this. I have debated the issue raised here with Dan Freed and Alan Dershowitz and some others. The thing that this bill would cause for the first time is an honesty in the bail process that does not exist now. It would force a judge to say, "This person is dangerous and I will keep him in," or "This person is not dangerous and I will let him out."

It will also eliminate the potential for what Mr. Harris referred to as "intellectual dishonesty" where a judge would have to say in his gut, "This guy is dangerous but I cannot deal with this, and what I am going to do is set a bail that is high enough that no bondsman will take it." This bill would eliminate that, and I think it is the significant and most important thing that the bill does.

Senator HATCH. Well, of course in some of the drug cases you cannot set the bond high enough, I guess, in many ways because they can come up with the money.

Mr. BEAUDIN. Mr. Chairman, that is exactly the other end of this coin. As long as money is there and a bail is set, even in the case under which courts can inquire behind where this money and this property is coming from, there is nothing that is going to stop the one who considers it a cost of doing business from securing release.

The retention of money bail will permit the release of people that can pay their way out, when a judge will put his hands up and say, "What could I do? I set it as high as I could."

[The prepared statement and material subsequently submitted by Mr. Beaudin follow:]

# PREPARED STATEMENT OF BRUCE D. BEAUDIN

It is a privilege to be invited to testify before this Subcommittee concerning S.1554 (The Bail Reform Bill of 1981) and I very much appreciate the opportunity to be here.

As Director of the D.C. Pretrial Services Agency since 1968; Director and Staff Attorney of the Public Defender Service here between 1964 and 1968; a member of the staff of the original D.C. Bail Project; founder and Chairman of the Board of the Pretrial Services Resource Center; founder, first President, and Co-Chairman of the Advisory Board of the National Association of Pretrial Services Agencies; and as someone concerned about the several problems posed by the release of certain defendants; I hope that my experiences of the past 17 years can be of some assistance to the deliberations of this Committee.

In general, I think S.1554 offers the most significant and, I might add, long overdue amendment to bail practices since we first "borrowed" the concept of bail from our English forebears. Its focus on the issue of danger and how it should be treated and its elimination of surety and money bail as an anachronistic and outmoded method of release commend it as a Bill well worth passage. Before addressing the Bill in its specifics, please permit me to mention briefly some background that sets the context for the balance of my remarks.

## Background and History

In 1966, Congress passed the Federal Bail Reform Act. This law was the culmination of many studies of the overwhelmingly complex problems posed by the release of people charged with crime pending trial. Because many people were indigent and because the bail system that had grown up in the United States usually required access to fairly large sums of money in order to secure release, many people were detained solely because of inability to raise the necessary funds.

The original purpose of the Bail Reform Act was to eliminate discrimination between rich and poor and to provide less restrictive methods of release for persons awaiting trial than the traditional option of posting bail through a surety. Without recounting the evils of the surety system and the inherent difficulties in using financial conditions to address the specific problems posed, suffice to say that the main goal of the Act was to effect the safe release of more people and to change the release methods from financial to less restrictive, nonfinancial means.

Unfortunately, during hearings on the bills, the issue of community safety, although addressed in testimony, was never mentioned in the law. The sole criterion that was established for determining which release conditions were appropriate was, "Will the condition imposed reasonably assure the appearance of the defendant as required?"

As mentioned, the initial purpose of the Bail Reform Act was to provide alternatives to the surety system to permit the release of more poeple pending trial and, at the same time, to eliminate discriminatory practices based on financial ability to "pay out." The Act did not address the practice of setting bail not so much to assure appearance as to protect society. The issue of community safety was subsumed into risk of flight considerations. Many bail setters used, and continue to use, high bail to detain dangerous persons. They justify the high bail on risk of flight grounds, however. Unless the issue of safety is addressed in the open and on the record, the bail process will continue to be criticized for its apparent inefficiency.

We need a new approach to the bailing of the criminal suspect. But an understanding of where we are and the course bail reform should take, first requires an examination of the myths and realities of current bail practices:

Myth No. 1 - Current bail laws assure that the bail decision is limited to a single issue: whether the suspect is likely to appear for trial. This noble constitutional principle is honored in the breach today. Most suspects detained in jail pending trial are unlikely threats to flee. The possibility of flight is all too often used as a pretext to detain suspects perceived by the court to be dangerous to the community if released. A pervasive hypocrisy infects the bail process as sub rosa considerations of community safety lie at the heart of the bail decision while judges make public pronouncements about the likelihood of flight. Former Supreme Court Justice Arthur Goldberg in testimony before this Subcommittee in June of 1970 stated, "The judge who predicts that a given defendant may commit a serious crime may set the bail at an amount he knows the defendant cannot afford."

Myth No. 2 - The more serious the crime, the more likely the possibility that an offender, if bailed, will flee. This is the most pervasive of the prevailing myths. Recent data confirms an opposite conclusion--that motivation to flee does not increase in direct proportion to the seriousness of the offense. The poorest bail risks--those most likely to flee rather than appear at trial--are not those charged with murder, rape and robbery, but, rather, suspects charged with relatively minor offenses such as larceny and prostitution.

Myth No. 3 - The setting of a financial bond is an effective way to guarantee a suspect's appearance at trial. Study after study demonstrates that the setting of a bail bond discriminates against the poor and that a simple promise to appear is as effective as the use of the bail bondsman in assuring appearance at trial. At the same time, it is clear that many who post bail (accused alien smugglers and narcotics traffickers, for example) can post even high bail, consider it a business expense, and fail to appear despite the substantial investment.

Myth No. 4 - Bail bondsmen are the best guarantors of court appearance. We have all grown up with the notion that people charged with crime get a bondsman and get out of jail. If court is missed, we all believe that bondsmen go and get the culprit. Yet, available data suggest that those released on recognizance and other conditions have better appearance records than those released through the efforts of professional bail bondsmen. (For summary findings, see Pretrial Services Annual Journal-IV, 1981, "A Proposal For The Reform Of Pretrial Release And Detention Practices In The United States"--Beaudin, Pryor and Henry, Wash.,D.C. 1981, note 27,p.80)

Of even more import is research that discloses that bondsmen play a rather meager role in returning to court those defendants who abscond. (See the above cited article, footnote 29 at p. 82.)

Those of us who are a part of the existing bail system continue to witness first-hand the evils traceable to these prevailing myths. The hypocrisy of the current system is responsible for the pretrial detention of thousands of suspects. It is time to recognize that considerations of community safety should candidly and publicly be taken into account by judges in attempting to fashion appropriate bail conditions.

## The Surety Condition: An Outmoded Alternative

The American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, the National Association of Pretrial Services Agencies, and the States of Wisconsin, Kentucky, Oregon, and Illinois have all concluded that the surety option of release serves absolutely no purpose. Both associations have recommended abolition of surety for profit. In the states named, the surety option has been eliminated and data reveal that neither recidivism, as measured by rearrest, nor failures to appear have increased while the percentage of people who have been able to secure release has increased. In fact, the commonwealth of Kentucky has made it a crime to post bond for profit and the Kentucky Supreme Court has upheld the validity of that law.

The surety bondsman has existed in our criminal justice society as an independent business person who exists to make a profit. In most cases, a surety charges 10% of the bond set as his fee for effecting release. That fee, once paid, is nonrefundable. We have permitted this enterprise on the theory that the bondsman, having a substantial monetary stake in the defendant's appearance (he may be liable for the face amount of the bond if the defendant fails to appear) will insure the appearance of his bailees. Again, data being collected by various pretrial services agencies, courts, and independent organizations is revealing. Most defendants who fail to appear are brought back into the system by law enforcement officers executing warrants not by bondsmen. In addition, where forfeitures are ordered, they are seldom, if ever, collected.

Thus, where we have hard evidence that alternatives work better, we should use them. S.1554 is exemplary in its direction to do just that, *viz.*, eliminate surety and money bail as a release option. In scuttling this dollar alternative, the Bill puts to rest once and for all the ability of the system to misuse money in a fashion that clearly discriminates against the poor.

## Danger and Preventive Detention

It is clear that considerations of danger--*never* a legal consideration in the bail process constitutionally or traditionally--can no longer be avoided. The right of the people to move safely about our Nation's streets is without question. We who would not tolerate another country's taking of American hostages, cannot afford to be taken hostage ourselves by fear of domestic crime. Yet, we must avoid the rhetoric of "quick-fix" answers and preserve our reputation as a Nation that protects the Civil Liberties of all of its citizens.

Since recent data demonstrate that those charged with serious offenses are among the most likely to appear at trial, we can no longer continue to justify their pretrial detention on some appearance based rationale. Rather, we must fashion release conditions designed to protect the community while, at the same time, assuring the release of most of those not yet convicted. Yet, we must establish a fair and accountable means for detaining those few who cannot be released. S.1554 is a giant step in the right direction.

## The Bill Itself

With two minor exceptions, I heartily endorse the Bill as it stands.

1. In §3146, "Penalty for failure to appear," the Bill provides that a releasee is guilty of an offense if "he fails to appear before a court as required..."

Our own data show that over half the failures to appear are non-wilfull. They occur for such reasons as no notice of court date; hospitalization; detention in a foreign jurisdiction; and other justifiable excuses. Given this circumstance, I would suggest that the following be substituted:

"he wilfully fails to appear...etc." and

"he wilfully fails to surrender...etc."

2. In §3141 proposed as a substitute for §3146, in paragraph (4) where the term "Crime of Violence" is defined, Sections A and B state "...physical force against the person or property of another..."

Since the real heart of the proposed "danger" amendments is to address the fear of violent crime to the person, I think the language should be changed. As presently defined, were I to bash in a car window to steal it, I could be detained as having been charged with a violent crime. I would suggest deletion of the words "or property" so that the section would read, "...physical force against the person of another...etc.," in both Sections A and B.

## Conclusion

In the past 17 years, I have witnessed bail abuse in many of our Country's States--including my own jurisdiction. I have worked with countless local, county, and state officials on the problems posed by such abuse. I have testified in some cases of bail abuse. At the heart of most of this abuse is the hypocrisy which permits judges to jail people under the guise of setting a release condition too burdensome to meet. The only way to eliminate this situation is to do exactly what S.1554 proposes: eliminate money as a means by which release is secured and permit an on-the-record confrontation of the issue of danger.

Thank you for your attention.

DISTRICT OF COLUMBIA
PRETRIAL SERVICES AGENCY
400 F Street, N.W. • Washington, D.C. 20001 • (202) 727-2911

BRUCE D. BEAUDIN, ESQ.
Director

JOHN A. CARVER III, ESQ.
Deputy Director

October 28, 1981

Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

I respectfully submit this letter as a follow-up to the testimony I provided the Subcommittee last Wednesday (October 21, 1981) during hearings on S.1554 (Bail Reform Act Amendments). At the conclusion of my testimony, I was asked to respond to the following five (5) questions:

1. I understand that the rate of no-shows has been significantly reduced in many districts where Pretrial Services Agencies have been established. To what degree have they been reduced? To what do you attribute any success in reducing the number of fugitives?

a.) As I understand it, both the Pretrial Services Division of the Administrative Office of the U.S. Courts (responsible for the administration of the 10 federal demonstration agencies created under the Speedy Trial Act) and the Lazar Institute (a Washington, D.C. based consultant firm that has just completed an evaluation of several state systems) have both concluded that both "no-show" and "rearrest" rates have improved with the advent of pretrial services agencies and with the use of alternative methods of release that have generally replaced the traditional surety bond alternative. I respectfully refer you to Mr. Guy Willetts (633-6449) of the Pretrial Services Division and Ms Mary Toborg (232-2400) for specific data.

b.) To answer this question, I should caution you that the word fugitive is usually used to identify someone who has fled a particular jurisdiction to avoid prosecution. These are few in number comprising fewer than 1 or 2% of the total number of people released. Data gathered by the Pretrial Services Resource Center (a federally funded clearinghouse of data concerning all types of pretrial services) indicates that most true fugitives are "recovered" by law enforcement officials. (You may contact Alan Henry or Don Pryor at 638-3080 for further information.) Of more concern than fugitivity - as a matter of court disruption - is concern over the failure to appear rate -- a rate made up of persons who miss court dates for various reasons but do not flee. Data show that these rates have been significantly reduced by services provided by pretrial services agencies. In the District of Columbia, where our Agency has operated since 1963, we have learned that better than 50% (½) of the failures to appear are non-willful on the part of the defendant, e.g., he is in jail, in the hospital, or has an otherwise valid reason for failing to appear. Special efforts on our part have reduced the failure to appear rate from about 12% four years ago to less than 8% in 1980.

2. How would you compare your services in pretrial supervision with the services provided by professional bail bondsmen? Which do you think comes closest to fulfilling the classical role of a surety? What is the cost to the government involved in your services?

a.) The services we provide to the Court System and the pretrial releasees are far more comprehensive and intensive than those provided by the professional surety. In the initial instance, we gather background information about community ties, criminal histories, etc., on every defendant brought before the court for bail hearing. The Court, the Prosecutor, and others are given a full report that enables a much more accurate and informed decision to be made. Also, most of the information becomes a matter of public record that is available for subsequent legal considerations such as sentence, diagnostic classification by correctional personnel, etc. In addition, subsequent to release, every defendant is notified of every court date; weekly contact is maintained with most releasees; assistance in locating and procuring various social services is provided; and, most important, the "system" is advised in writing of any violation of any court ordered condition of release. In contrast, the bondsman interviews only those he chooses; provides no information to the court initially other than notice of intent to "bail" the defendant; is not concerned with and generally does not monitor safety control conditions ordered by the court; and does not generally provide information at sentence.

b.) In the feudal days, the surety literally stood in the place of a defendant for whom he stood bail. Usually a relative or close friend, the bond between bailor and bailee was close. In fact, in a case of default, the surety went to jail in place of the defendant. Modern practice results in an attenuated relationship between surety and defendant that is based strictly on a financial incentive contract mutually defined by bondsman and defendant with the Court having little or no say in the bargaining. In the words of one jurist often quoted, "...the bondsman (not the Court) holds the key to the jailhouse in his pocket." A bondsman's only incentive is profit. Pretrial Services Agencies, on the other hand, are interested in assisting both the Courts and the defendants. As a result, their role is much closer to that of the original surety.

c.) Our program costs the D.C. Government $1,250,000 per year. For this cost, over 25,000 reports are delivered at initial bail setting; over 50,000 notification letters are dispatched; over 15,000 cases are supervised for a minimum of a 9 month average; and presentence writeups are delivered in over 1,000 cases. Average cost: $50 per case. While certainly not all these people would be jailed, it must be remembered that as little as 5 years ago, there was a jail overcrowding problem in the District of Columbia. The new facility built to replace one constructed in the early 19th century was scaled down saving nearly $20,000,000. in construction and maintenance costs. The cost to maintain a prisoner in an institution in D.C. exceeds $55 per day according to D.C. Department of Correction estimates. Since this figure includes fixed costs - overhead, building maintenance, etc., - it might be misleading to calculate savings based on that computation. We have been told, however, that transportation and "out-of-pocket" costs for food, clothing, etc., exceeds $30 per day per prisoner. A quick mathematical computation shows that 41,667 days can be bought for the amount of our budget. This means that 154 people could be detained for 9 months. Without our services, given 9000 felonies of which 1500 are considered dangerous under the D.C. Statute, only 10% could be detained for the equivalency investment of our budget. These figures, of course, do not even address the issues of human costs, right to release, etc. Suffice to say, as was said by the United States Department of Justice in citing the D.C. Pretrial Services Agency as one of 35 exemplary programs so designated since the inception of LEAA:

> "After nearly 20 years of experience and research, the Pretrial Services Agency has shown that the courts can grant non-financial release to the majority of defendants without increasing rates of rearrest or failure to appear. The Agency's services are exceptionally comprehensive, well documented, and adaptable to jurisdictions of any size."

3. One of the major objections to money bail is that judges have used it as a means to achieve pretrial detention in the absence of a statute allowing them to detain suspects on account of the threat they may pose to the community. If this Bill does as you recommend in making dangerousness a factor in bail proceedings, then judges should not have to use money bail as a subterfuge. With that problem out of the way, would it not be appropriate to let the court, in its discretion, continue to use financial inducement to appear for trial? If we eliminate the need for courts to abuse money bail, why should we eliminate this additional tool to get defendants to court?

a.) When the D.C. Bail law was passed in 1970, Attorney General Mitchell and Deputy Associate Attorney General Donald Santarelli, heralded the detention and danger sections of the Bill as the means by which the hypocritical use of high money bail to detain dangerous (as distinguished from flight risk) defendants would be eliminated. Unfortunately, the law retained the use of money bail to address flight concerns providing, "No financial condition may be imposed to assure the safety of any other person or the community." It was believed that danger and flight issues would be faced squarely and separately. They were not; they seldom are to this day. History reveals the sparse use of the detention sections since 1971. Explanations vary. In my judgment, its use has been sparse precisely because the prosecutors have done what they've always done: used arguments about flight risks to justify requests for high money bail which, in most cases, will result in pretrial detention. The only way to insure community protection - after all, alleged racketeers and narcotics traffickers can post inordinate amounts of bond and consider it a cost of doing business - is to see to it that no loophole exists which can permit the system to avoid its responsibility. On the other hand, all the data we have collected since the bail revolution of the 60's has demonstrated that most defendants - particularly those charged with so called violent crimes - are excellent risks when it comes to appearance. Their pretrial detention simply cannot be justified on flight grounds since they virtually never fail to appear. Despite the conventional wisdom that tells us people facing serious penalties are more likely to flee, our experience has disproved the myth. In short, if we continue money bail as an option, we will continue the possibility of abuse of discretion, discrimination between rich and poor, and, most important, we will leave the door open to further exploitation of the community by permitting the existence of a mode of release that serves absolutely no purpose.

b.) Put simply, the Bill as it stands would eliminate the need for courts to abuse money bail. If, however, money bail is left in, the federal system will experience what happened in D.C. Rather than face the stringent requirements necessary to satisfy a detention order, Prosecutors will simply take the easy way and seek high bail on what we know to be inaccurate and phony grounds. Why? To get high bail one need only say a person is a high risk based on the severity of sentence he faces. This logic has prevailed in most appellate courts; indeed, even in the U.S. Supreme Court. To effect a detention order, one must show he has a colorable chance of a successful prosecution; that the defendant fits a certain class; and that no conditions other than detention would protect the community. A final reason for eliminating financial conditions is simply that they are unnecessary. In reviewing literally thousands of cases in the last 20 years, I have never seen one where other conditions would not do the job as well as posting money. For the wealthy, signing over titles to property to be held by the court provides more motivation to return than posting dollars that are easier to get...and leave. For the poor who need the use of resources, threat of loss of prized possessions, threat of sanctions for condition violations, etc., are more effective than money. Of all conditions, money is the worst and least effective as a means of inducing appearance...and we do not need to hypothecate on this issue; we have proved it in testing alternatives that have worked.

4. Could you give the Subcommittee some more detail about the studies you mentioned in your statement that demonstrate that money bail does not help assure a suspect's appearance for trial?

In an article entitled, "A Proposal For The Reform Of Pretrial Release And Detention Practices In The United States," Pretrial Services Resource Center Annual Journal, 1981, Washington, D.C. p.68, authors Beaudin, Pryor, and Henry cite many studies that support their various suggestions for reform. At p.97 in a section entitled Reform #5, the authors argue that bail bond for profit (Surety) should be eliminated, and financial conditions severely curtailed. At p.100, they say, "Although statistically it is clear that the use of monetary forms of release are no better at assuring court appearance than are nonfinancial forms of release..." and cite the following:

a.) Michael Kirby, FTA - Failure To Appear: What Does It Mean. How Can It Be Measured? (Wash., D.C., Pretrial Services Resource Center,1979) p.7;

b.) Stevens Clarke, Jean Freeman, and Gary Koch, The Effectiveness of Bail Systems: An Analysis Of Failure To Appear In Court And Rearrest While On Bail (Chapel Hill, N.C.: Institute of Government, University of North Carolina, 1976) Table 4 showing bondsmen with the highest FTA rate of all five types of release;

c.) Michael Kirby, An Evaluation Of Pretrial Release And Bail Bond In Memphis And Shelby County (Memphis, Tenn.: The Policy Research Institute, Southwestern College, 1974) p.36 showing significantly higher nonappearance rates for those released through bondsmen (compared with those released through the release program) for both misdemeanor and felony cases;

d.) Jeffrey Roth and Paul Wice, Pretrial Release and Misconduct in the District of Columbia (Wash, D.C.: Institute for Law and Social Research, 1980, pp 43-44 showing comparable appearance rates for bondsmen and personal recognizance and other forms of release;

e.) note 27 at pp 80-81 which cites studies in Philadelphia, Connecticut, etc., to the same point, viz., that recognizance is as effective as money bail.

5. You recommend that the Subcommittee change the S.1554 definition of "crime of violence" which now reads, "physical force against the person or property of another" by deleting the words "or property." This

crime of violence definition is important in determing when pretrial detention is justified. I can envision cases, such as destructive burglaries, arsons, or auto thefts, which are crimes against property, which, in the discretion of the courts, might justify some form of detention. If an individual commits several violent crimes against property and is likely to commit others if released, why would you deny the courts the discretion to detain him? In some instances, these crimes against property could result in bodily injury if the court does not prevent the suspect from continuing to perform them--arson or burglary, for instance, should not the court have discretion to detain these individuals?

a.) I don't think the courts should be denied the opportunity to order detention of those charged with crimes that have the actual potential for harm to human beings. The problem here is in including the potential for using the statute in totally inappropriate cases... such as breaking into a warehouse at night, stealing a car with no one in it, etc. At common law, property crimes were divided into those with potential for harm to persons and those without, e.g., housebreaking into an occupied dwelling at night carried a much stiffer penalty than housebreaking during the day into an unoccupied dwelling. I maintain that the language, "...any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person of another may be used"...would cover any case in which an apparent property crime, i.e., theft, potentially involves personal harm while excluding such cases as grand larceny from a warehouse.

b.) I think my answer in (a) above covers this question.

If you should have any additional questions or if I can be of any additional assistance, please do not hesitate to contact me.

Yours truly,

Bruce D. Beaudin

Bruce D. Beaudin

Senator HATCH. Well, I think all witnesses today have made some pretty good points. We are studying this with all we have to try to come up with the best approach we possibly can. We think you have added a great deal as well today.

I would like to submit some questions to you in writing rather than take time here today because these questions would require some detailed answers. Therefore, if we can do that, with that we will recess these hearings until our next hearing on the subject.

Thank you.

[Whereupon, at 2:45 p.m., the committee recessed, to reconvene at the call of the Chair.]

# APPENDIX

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

EDWARD J. KING
GOVERNOR

October 23, 1981

The Honorable Orrin G. Hatch
Chairman, Subcommittee on the Constitution
Judiciary Committee
United States Senate
Washington, D.C. 20510

Subject: Federal Bail Reform

Dear Senator Hatch:

I wholeheartedly endorse the efforts of the Congress and the President to strengthen our federal bail laws.

Enclosed for your information are my statement and supporting materials, to be considered in conjunction with hearings of the Subcommittee on the Constitution, United States Senate Judiciary Committee, relative to federal bail reform.

Thank you for your consideration of my views on this subject.

Sincerely,

Edward J. King

Edward J. King
Governor

EJK/rmk
encs

## PREPARED STATEMENT OF MASSACHUSETTS GOVERNOR EDWARD J. KING

Mr. Chairman and members of the Subcommittee on the Constitution. Thank you for the opportunity to offer my strong support for your efforts to strengthen our federal bail laws.

As Governor of the Commonwealth of Massachusetts, I would like to point out that your actions at the federal level in the area of bail reform will have a direct and important impact on criminal activity in our state, while also setting an example for legislative action at the state level.

Today's appalling crime rate throughout the nation and within the Commonwealth of Massachusetts has resulted in part from over two decades of permissiveness in dealing with criminals. The time has come to recognize that that approach has clearly failed, and to reverse that policy.

As you know, under the Federal Bail Reform Act of 1966, the only issue a federal judge may consider in determining bail in non-capital offenses is whether the defendant is likely to appear for trial. Danger to the public and the need to protect society cannot be considered under the present law.

In 1971, Massachusetts enacted a similar bail statute which also restricts the judge's consideration in bail hearings exclusively to the issue of likelihood of appearance. The impetus for its enactment was, in part, the existence of the 1966 Federal Bail Reform Act.

The 1971 Massachusetts Bail Reform Act, like the 1966 Federal Bail Reform Act, was too liberal. In the courtrooms of Massachusetts, the default rate has increased dramatically, while countless more violent and serious crimes have been committed by dangerous persons released awaiting trial. Our judges are now legally powerless to deal with even the most clearly dangerous, habitual offenders prior to trial.

I have proposed bail reform legislation in Massachusetts that would focus the court's attention openly on the issue of danger posed by the re-release of defendants who are arrested for crimes committed while the defendant is on bail. It would allow judges to revoke bail and order pretrial confinement in certain carefully limited circumstances consistent with constitutional standards.

Neither the United States Constitution, nor the Massachusetts Constitution which preceeded it, grants an absolute right to bail.

I applaud the recent decision of the District of Columbia Court of Appeals in United States v. Edwards, No. 80-294, No. 80-401 (D.C. Ct. App., decided May 8, 1981, petition for cert. filed, U.S. No. 81-5017), upholding the constitutionality of the District of Columbia pretrial detention statute. In a comprehensive analysis of colonial and state bail rights relative to the federal constitutional excessive bail clause, the Court also stated:

> "The Massachusetts Constitution of 1780 included an excessive bail clause, but the right to bail itself was relegated to statutory status. This excessive bail clause makes clear that it was intended as a limitation on the judiciary and not the legislature. . ." (Emphasis added.) Id. at 13.

Mr. Chairman, I realize that the states have primary responsibility for combatting crime. But the Congress can be effective in at least two ways in the area of bail reform. First, any improvements that strengthen federal bail laws will benefit every state by reducing the incidence of federal crimes occurring within those states. For example, major drug traffickers who seek to practice their trade in Massachusetts often smuggle drugs by sea into our coast in violation of federal law. They are notorious for their high default rate in federal court even when high money bail is imposed. We need tougher federal bail laws to deal with this problem in our state.

Secondly, we know that state and federal laws can serve as examples for one another. Mr. Justice Brandeis once observed:

> "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (Brandeis, J., dissenting).

Mr. Chairman, the 1966 Federal Bail Reform Act provided an example that some states have followed, to their regret. I suggest that the enactment by the Congress of Senate Bill No. 1554 or similar legislation will go a long way toward setting a better example for the states.

In conclusion, Mr. Chairman, I am pleased that your Committee is examining the need for improvements in the federal bail laws. I support the reforms embodied in Senate Bill No. 1554. I also urge the Committee to give attention to the specific need to detain major drug traffickers, who often flee when released on bail. This particular problem is addressed in Senate Bill No. 1253.

Thank you.

# HOUSE . . . . . . . . No. ~~6320~~ 7176

## The Commonwealth of Massachusetts

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

EDWARD J. KING
GOVERNOR

February 27, 1981

TO THE HONORABLE SENATE AND HOUSE OF REPRESENTATIVES:

Today, I am submitting to your Honorable Bodies the accompanying legislation entitled, "AN ACT RELATING TO PRETRIAL RELEASE AND CONFINEMENT."

Under the present Massachusetts law, a judge's decision on bail release is restricted to one issue: whether the defendant is likely to appear at the next court proceeding. Danger to other persons and the protection of society may not be considered under the present law, regardless of how often the defendant may be rearrested before trial or how dangerous he may be. Even the most clearly dangerous, habitual violent offenders are routinely released into society, and they often commit serious crimes while awaiting trial. This is especially troublesome when witnesses are intimidated by the accused.

The legislation I am submitting today will provide as an explicit condition of release that the defendant refrain from criminal activity during the period of his release. It will allow the judge to revoke bail when the court finds probable cause to believe that the defendant has violated this condition, if the court determines that the defendant's release would pose a serious danger and that his detention is necessary to reasonably assure the safety of any person or the community. In such cases, the defendant could be held without bail for up to sixty days and would have the right to a speedy trial.

This legislation also addresses the problem of defaults. It will retain the presumption of release on personal recognizance, but will add to the list of factors presently used in evaluating likelihood of appearance, the following new factors: the potential criminal penalty the defendant faces, the use of an alias or false identification, illegal drug use or dependency, whether the defendant is on bail for a prior charge, is on probation or parole for a prior conviction, or is on release pending sentence or appeal for a prior conviction.

Finally, this legislation promotes the imposition of consecutive sentences for a defendant convicted of a crime that was committed while the defendant was on bail for a prior charge.

I respectfully request your prompt and favorable attention to the enactment of this legislation.

Respectfully submitted,

Edward J. King

Edward J. King
Governor

# HOUSE . . . . . . . . No. 7176

Substituted by the House, on motion of Mr. Flaherty of Boston, for a Bill relating to pretrial release and confinement (printed in House, No. 6320, changed). September 21.

## The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Eighty-One.

AN ACT RELATIVE TO BAIL, PRETRIAL RELEASE AND CONFINEMENT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Section 58 of chapter 276 of the General Laws is hereby amended by striking out the first paragraph, as appearing in section 1 of chapter 473 of the acts of 1971, and inserting in place thereof the following paragraph: —

A justice or a clerk or assistant clerk of the district court, a bail commissioner or master in chancery, in accordance with the applicable provisions of section fifty-seven shall, when a prisoner is held under arrest or committed either with or without a warrant for an offense other than an offense punishable by death, or for any offense on which a warrant of arrest has been issued by the superior court, hold a hearing in which the defendant and his counsel, if any, may participate and inquire into the case and shall admit such person to bail on his personal recognizance without surety unless said justice, clerk or assistant clerk, bail commissioner or master in chancery determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the prisoner before the court. In his determination, said justice, clerk or assistant clerk, bail commissioner or master in chancery shall, on the basis of any information which he can reasonably obtain, take into account the nature and circumstances of the offense charged, the potential penalty the prisoner faces, the prisoner's family ties, financial resources, employment record and history of mental illness, his reputation and the length of residence in the community, his record of convictions, if any, any illegal drug ~~use or~~ dependency, any flight to avoid prosecution or fraudulent use of an alias or false identification, or any failure to appear at any court proceeding to answer to an offense, whether the prisoner is on bail pending adjudication of a prior charge, whether he is on probation, parole, or other release pending completion of sentence for any conviction, and whether he is on release pending sentence or appeal for any conviction. The person authorized to admit the prisoner to bail shall provide as an explicit condition of release for any prisoner admitted to bail pursuant to this section or section fifty-seven that should said prisoner be charged with a crime during the period of his release, his bail may be revoked in accordance with the third paragraph of this section.

distribution or
present drug

SECTION 2. The third paragraph of said section 58 of said chapter 276, as so appearing, is hereby amended by striking out the first sentence and inserting in place thereof the following six sentences:

A prisoner aforesaid charged with an offense and not released on his personal recognizance without surety by a clerk or assistant clerk of the district court, a bail commissioner or master in chancery shall forthwith be brought before the next session of the district court for a review of the order to recognize in accordance with the standards set forth in the first pararaph and this paragraph of this section. The court shall provide as an explicit condition of release for any prisoner admitted to bail pursuant to this section or section fifty-seven that should said prisoner be charged with a crime during the period of his release, his bail may be revoked in accordance with this paragraph. If a prisoner is on release pending the adjudication of a prior charge, and the court ~~after a hearing~~, finds probable cause to believe that the prisoner has committed a crime during said period of release, the court shall then determine, in the exercise of its discretion, whether the release of said prisoner will seriously endanger any person or the community. In making said determination, the court shall consider the gravity, nature and circumstances of the offenses charged, the prisoner's record of

at the probable
cause hearing, or
at a separate
hearing of the
prisoner has
been indicted,
of which the
prisoner shall
have the right
to be represented
by counsel

convictions, if any, and whether said charges or convictions are for offenses involving the use or threat of physical force or violence against any person, whether the prisoner is on probation, parole or other release pending completion of sentence for any conviction, whether he is on release pending sentence or appeal for any conviction, the prisoner's mental condition, and any illegal drug ~~use or~~ dependency. If the court determines that the release of said prisoner will seriously endanger any person or the community and that the detention of the prisoner is necessary to reasonably assure the safety of any person or the community, the court may revoke bail on the prior charge and may order said prisoner held without bail pending the adjudication of said prior charge, for a period not to exceed sixty days. Said order shall state in writing the reasons therefor. A prisoner so held shall be brought to trial as soon as reasonably possible.

distribution
or present
drug

and shall be reviewed
by the court upon the
acquittal of the
prisoner, or the
dismissal of,
any of the
cases involved

SECTION 3. The fourth paragraph of said section 58 of said chapter 275 as so appearing, is hereby amended by striking out, in line 2, the word "paragraph" and inserting in place thereof the words: — and third paragraphs.

SECTION 4. The fifth paragraph of said section 58 of said chapter 276, as so appearing is hereby amended by adding the following sentence: — The court may also review such changed circumstances or other factors not previously known or considered in accordance with the third paragraph of this section.

SECTION 5. Chapter 279 of the General Laws is hereby amended by inserting after section 8A the following section: —

*Section 8B.* If the defendant was on release subject to the provisions of section fifty-eight of chapter two hundred and seventy-six when the crime was committed, the presumption shall be that the sentence shall run consecutively to the earlier sentence for the crime for which he was on release.

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# BAIL REFORM
# CONSTITUTIONAL ISSUES
# OF
# HOUSE BILL NO. 7176 (FORMERLY H. 6320)
# "AN ACT RELATING TO BAIL, PRETRIAL RELEASE AND CONFINEMENT"

CURT C. PFUNDER
OFFICE OF THE GOVERNOR'S
LEGAL COUNSEL
STATE HOUSE - ROOM 271
BOSTON, MA. 02133
(617) 727-2065

## I. H.7176 Does Not Violate the Presumption of Innocence

The claim has been made that the presumption of innocence would be abridged by the provision of H. 7176 which authorizes revocation of bail.

Initially, it must be pointed out that bail has always been denied in certain cases, especially murder cases, and this has never been held by the courts to violate the presumption of innocence. Certainly the presumption of innocence is no different in murder cases than in other cases. No clear legal reason for a double standard is evident.

Moreover, the presumption of innocence does not attach until trial. As recently as 1979, the Supreme Court of the United States held that the presumption of innocence "has no application to the rights of a pretrial detainee before his trial has even begun." Bell v. Wolfish, 441 U.S. 520, 533 (1979). In describing the presumption of innocence, the Court stated:

> "The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. Taylor v. Kentucky, 436 U.S. 478, 485 (1978); see Estelle v. Williams, 425 U.S. 501 (1976); In re Winship, 397 U.S. 358, (1970); 9 J. Wigmore, Evidence § 2511 (3d ed. 1940) ... Without question, the presumption of innocence plays an important role in our criminal justice system. 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' Coffin v. United States, 156 U.S. 432, 453 (1895). But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun". (emphasis added).

Those who disagree with this clear statement by the Court in 1979 probably rely on dictum from Stack v. Boyle, 342 U.S. 1, 4 (1951), which indicates that the presumption of innocence "would lose its meaning" unless the right to bail before trial is "preserved." But the Stack decision was based on a statutory right to bail and not a constitutional right to bail. To the extent that Bell v. Wolfish is inconsistent with the dictum in Stack concerning the presumption of innocence, that dictum has effectively been repudiated by the Court.

In Bell v. Wolfish, pretrial detainees in the District of Columbia challenged the constitutionality of alleged overcrowed conditions and certain other practices in a federally operated short-term custodial facility. These suspects were detained pursuant to the Federal Bail Reform Act of 1966, 18 U.S.C. SS 3146, 3148, solely for the purpose of ensuring their presence at trial. The legitimacy of this goal was unquestioned. The Court observed that:

> "...the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and... that confinement of such persons pending trial is a legitimate means of furthering that interest." Id., 441 U.S. at 534.

The Court further noted that it had

> "... no occasion to consider whether any other governmental objectives may constitutionally justify pretrial detention." Id., 441 U.S. at 534, n. 15.

From Bell v. Wolfish, at least two important conclusions are clear. The first is that the United States Supreme Court has not yet ruled on the precise issue of whether the need for protection of the public from dangerous suspects may constitutionally justify pretrial detention. The second is that such a practice is not prohibited by the presumption of innocence, because the presumption "has no application to the rights of pretrial detainees."

In Blunt v. United States, 322 A. 2d 579, (D.C. App. 1974), the United States Court of Appeals for the District of Columbia, upholding the validity of a statute authorizing the denial of bail to certain criminal defendants because of their danger to community safety, stated:

> "The presumption of innocence, however, has never been applied to situations other than the trial itself...and the history of criminal jurisprudence in this country and England...reveals the inapplicability of the presumption to pretrial detention." Id. at 584.

The logic of the latter conclusion is evident because the presumption of innocence primarily serves the purpose of impressing on the judge or jury that any doubt as to a defendant's guilt must be resolved in favor of the accused and that the burden of proving guilt is on the prosecution.

In McCormick on Evidence, (2nd Ed. 1972), the presumption is explained as a description of the prosecutorial burden at trial.

> "In criminal cases, the 'presumption of innocence' has been adopted by judges as a convenient introduction to the statement of the burdens upon the prosecution, first of producing evidence of the guilt of the accused and, second, of finally persuading the jury or judge of his guilt beyond a reasonable doubt." Id. at 805-06.

The purpose of the bail revocation provision of H. 7176 is to protect society from serious danger posed by the re-release of certain defendants prior to their trial. This legitimate state purpose in no way conflicts with or violates the purpose of the presumption of innocence, which is to instill in the minds of the court and jury that the burden is on the prosecution at trial to prove that the accused is guilty beyond a reasonable doubt.

## II. H. 7176 Does Not Violate the Excessive Bail Clause of the Eighth Amendment to the United States Constitution.[1]

The only reference to bail in the United States Constitution is found in the Eighth Amendment, which provides in pertinent part that:

> "Excessive bail shall not be required...."

Despite the simplicity and clarity of the language employed, two principal schools of thought exist concerning the scope of this amendment. One argument is that the Eighth Amendment creates a constitutional right to bail. A contrary view is that the Eighth Amendment merely prohibits excessive bail where a right to bail otherwise exists. The plain language of the amendment, its historical background, and the weight of judicial authority all provide solid support for the latter interpretation.

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[1] For the purpose of this memorandum, this argument is premised on the assumption that the excessive bail prohibition of the Eighth Amendment is applicable to the Commonwealth of Massachusetts through the Fourteenth Amendment. In Commesso v. Commonwealth, 369 Mass. 368 (1975), the Supreme Judicial Court of Massachusetts noted that the Eighth Amendment "has been assumed to have application to the states." See Shilb v. Kuebel, 404 U.S. 357, 365 (1971). Also, the Supreme Judicial Court expressly ruled in Commonwealth v. Baker, 373 Mass. 65 (1977) that the denial of bail did not violate the Eighth Amendment, although the court did not discuss how the Eighth Amendment was applicable to the Commonwealth.

It should be noted, however, that the United States Supreme Court has not specifically determined whether the prohibition against excessive bail established by the Eighth Amendment to the Constitution of the United States is applicable to the states through the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. While the issue therefore remains unsettled, several lower federal courts and state courts have held that the excessive bail prohibition of the Eighth Amendment applies to the states under the Fourteenth Amendment. Hunt v. Roth, 49 U.S.L.W. 2765 (8th Cir., decided May 13, 1981), Mastrian v. Hedman, 326 F. 2d 708, 711 (8th Cir. 1964), cert. denied, 376 U.S. 695 (1964); United States ex rel. Covington v. Coparo, 297 F. Supp. 203, 205 (S.D. N.Y. 1969); Wansley v. Wilkerson, 263 F. Supp. 54, 56 (W.D. Va. 1967); Hanson v. Gladden, 426 P. 2d 465 (1967).

The plain language of the excessive bail clause indicates that it merely prohibits excessive bail. No mention is made therein of either an absolute or qualified right to bail. Nevertheless, advocates of a constitutional right to bail might argue that the right is a necessary implication of the explicit prohibition against excessive bail. They would reason that the purpose of the excessive bail prohibition is to prevent the practical denial of bail by setting the amount so unreasonably high that it cannot be met. This purpose could be thwarted, they argue, if Congress or state legislatures could define those circumstances in which an accused was not entitled to bail.

While the above argument may have a degree of logical appeal, it raises an immediate, obvious objection. If the framers of the Constitution had intended to establish a right to bail, either absolute or conditional, they could have expressly provided for it.[2/] The total absence of any language in the federal constitution establishing a right to bail strongly evidences a lack of intent to create such a right.

Another persuasive indication that the framers of the Eighth Amendment did not intend to establish a constitutional right to bail is that Congress enacted a statutory right to bail in non-capital federal cases in the Federal Judiciary Act of 1789. If the Eighth Amendment was intended to grant a right to bail, its authors could not have missed the glaring inconsistency between its scope and that of the Judiciary Act of 1789. If the Eighth Amendment was intended to guarantee a right to bail, as it provides for no exceptions, the act of 1789 would have been inconsistent, since it exempted capital offenses. The enactment of the Judiciary Act of 1789 in

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[2/] Some states, either by statutory or constitutional provisons, established both a right to bail for certain offenses and a prohibition against excessive bail. For example, North Carolina and Pennsylvania enacted constitutional provisions which granted a right to bail for non-capital offenses and separate constitutional provisions which prohibited excessive bail. The proposals for a federal bill of rights from each of these two states only included an excessive bail clause. In fact, of the eight states (including Massachusetts) which submitted federal amendment proposals, not one included a provision establishing a right to bail. Meyer, Constitutionality of Pretrial Detention, 60 Georgetown Law Journal 1139, 1191-1194 (1972).

conjunction with the virtually simultaneous enactment of the eighth amendment indicates that an inflexible constitutional right to bail was not intended. Whether a particular offense should be bailable was evidently deemed a determination more appropriately left to legislative enactment which could be more easily revised with changing circumstances and attitudes.

The framers of the Eighth Amendment intended to do exactly what they accomplished, which was to constitutionally preclude the imposition of excessive bail in those cases where an accused has otherwise been granted a right to bail. The Eighth Amendment was intended to correspond in scope with its counterpart in English law,[3/] as noted by the United States Supreme Court:

> "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept...."
> Carlson v. Landon, 342 U.S. 524, 545 (1952).

In reviewing judicial interpretations of the eighth amendment, it is necessary to distinguish between cases which address the issue of whether a particular accused was required to post an excessive bail bond and cases which involve the question of whether a federal or state statute may properly authorize denial of bail in certain circumstances.

Proponents of a constitutional right to bail probably rely in large part on dicta from Stack v. Boyle, 342 U.S. 1, 4-5 (1951), which states that the setting of bail must be based on standards relevant to assure the presence of the defendant, and that a right to bail exists. However, the Court in Stack was dealing with a statutory right

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[3/] Although it is unnecessary for the purpose of this argument to indulge in a lengthy discussion of the development of bail in English Law, several points bear mentioning. The concept of a prohibition against excessive bail gradually evolved from three principal documents: the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689. The excessive bail prohibition is in clause ten of the English Bill of Rights of 1689. Its purpose was to preclude judges from setting excessive bail in cases where an accused was by law bailable. An exhaustive analysis of the evolution and meaning of the excessive bail clause of English law is found in Meyer, Constitutionality of Pretrial Detention, 60 Georgetown Law Journal 1139, 1180-1190 (1972).

to bail rather than a constitutional right. The issue therein was whether the amount of bail was excessive under the Eighth Amendment, where the applicable federal bail statute granted a right to bail. Therefore, reliance on this case is misplaced. Set against the *dictum* in *Stack* are the *dictum* and holding in *Carlson*, *supra*, which was decided four months after *Stack*.

*Carlson*, unlike *Stack*, involved the constitutionality of a statute authorizing the denial of bail. This 1952 case involved active alien communists who were detained without bail pending deportment proceedings, pursuant to section 23 of the Internal Security Act, a statute which gave the Attorney General the discretion to detain aliens without bail. The Court held that Congress constitutionally may provide for denial of bail for persons arrested pursuant to federal law. In so holding, the court stated:

> "The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases." 342 U.S. 524, 545-546.

While *Carlson* is distinguishable from H. 7176 since it was a case involving the power of Congress to regulate aliens, numerous cases have considered whether Congress and the states may constitutionally authorize the denial of bail for certain offenses. The courts considering the issue have upheld the power of Congress and the states to deny bail for certain offenses, so long as that power is reasonably exercised.

In *United States v. Edwards*, No. 80-294, No. 80-401 (D.C. Ct. App., decided May 8, 1981, petition for *cert*. filed U.S. No. 81-5817) the Court of Appeals for the District of Columbia upheld the constitutionality of the District of Columbia pretrial detention statute, D.C. Code 1973, § 23-1322, under which a suspect arrested for certain offenses may be detained for up to sixty days pending trial.

In a comprehensive analysis of the excessive bail clause of the Eighth Amendment to the United States Constitution, Chief Judge Newman discussed the history of English bail, the colonial and state constitutional bail systems, the Bill of Rights, the case law and law review articles, and the purpose of the excessive bail clause in the constitutional scheme. The court concluded that the excessive bail clause did not constitutionally prevent Congress from authorizing the denial of bail, as it has done in the D.C. Code.

In Commonwealth v. Baker, 343 Mass. 162 (1961), the Supreme Judicial Court of Massachusetts held that where one is charged with the capital offense of murder in the first degree, " bail in such a case is not a matter of right but is discretionary with the judge." The court has recently reaffirmed this rule in Commonwealth v. Carrion, 370 Mass. 408 (1976) and Commonwealth v. Marshall, 373 Mass. 65 (1977). In the latter case, the court expressly rejected the defendant's contention that denial of bail violated his rights under the Eighth Amendment to the Constitution of the United States.

A leading case in the Eighth Circuit which discusses the constitutional issues involving bail is Mastrian v. Hedman, 326 F. 2d 708 (8th Cir. 1964), cert. denied 376 U.S. 965 (1964). While the specific holding of Mastrian decided whether the amount of bail imposed was excessive, the court, in discussing the general issues concerning bail, made the following instructive comments:

> "Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial...Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail". Id. at 710.

Similarly, in Turco v. State of Maryland, 324 F. Supp. 61 (D. Md. 1971), the petitioner was denied bail under a court rule which authorized the court to exercise discretion in allowing bail in capital cases. The petitioner alleged a violation of the Eighth Amendment. In rejecting his contention, the court stated:

> It should be noted that the Eighth Amendment has never been considered to prevent Congress from classifying criminal cases into those in which an accused is entitled to bail as a matter of right and those in which the allowance of bail is a discretionary matter. . . (citations omitted.)
>
> If the federal government is not proscribed by the Eighth Amendment from denying bail in certain types of cases, neither is the State of Maryland prohibited from following a rule classifying types of criminal cases into those in which bail is allowed as a matter of discretion. Mastrian v. Hedman, supra; Dameron v. Harson, 255 F. Supp. 533 (W.D. La. 1966), aff'd, 364 F. 2d 991 (5th Cir. 1966). Id. at 63-64.

In United States ex rel. Covington v. Caparo, 297 F. Supp. 203 (S.D. N.Y. 1969), the petitioner, who was charged with first-degree murder, was denied bail under a New York statute which left the decision of admission to bail in felony cases to the discretion of the court. (First-degree murder is not punishable by death in New York.) The petitioner alleged that his denial of bail in a non-capital offense constituted a violation of the Eighth Amendment. The court rejected his contention and stated:

> "Petitioner assumes that the Eighth Amendment, binding upon the State of New York under the Fourteenth Amendment, requires that bail be granted as a matter of right in all except capital crimes. The Eighth Amendment, however, does not mention, much less distinguish between, capital and other felonies. It provides only that 'excessive bail shall not be required***.' It is true, as petitioner contends, that some courts have constructed the Eighth Amendment to guarantee the right to bail in all but capital cases, but such statements must be considered in the context of the Congressional statute governing bail, rather than as a command under the Eighth Amendment." Id. at 205.

The court further noted:

> "And as Congress is free, within constitutional limits, to define the classes of crimes which are bailable as a matter of right and those that are not, so, too, may the state legislatures. While the Supreme Court has not passed upon the direct issue, those federal courts which

> have are in accord that the Eighth and Fourteenth Amendments do not require the state to grant bail in all cases as a matter of right; all have recognized that a state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, provided that the power is exercised rationally, reasonably and without discrimination. Thus, it is left to the courts to fix the amount of bail in all cases where it is a matter of right and also in those instances where the court exercises its discretion favorably but, under the Eighth Amendment where bail is fixed in either instance, it must not be excessive, and further, when bail is not a matter of right, the court may not arbitrarily or unreasonably deny bail." Id. at 206.

The analysis of Covington is particularly instructive, as some defendants would argue that the Eighth Amendment specifically grants a right to bail in non-capital cases. The court in Covington noted that the recent "enlightened" decision of New York to eliminate the death penalty in cases of first-degree murder cannot automatically mean that a right to bail now exists. The penalty is only one factor to consider in determining whether bail is a matter of right. The court held that the state court could reasonably have determined that there was a substantial risk that the defendant, if released on bail, would not appear for trial and that his release might constitute a danger to the community.

Further support for this line of analysis is revealed in cases involving state constitutional provisions concerning bail. In State v. Garrett, 493 P. 2d 1232 (Ariz. 1972), the court was asked to determine whether a provision of the Arizona state constitution, which denied bail to persons charged with committing a felony while already admitted to bail, violated the Eighth Amendment to the United States Constitution. The court upheld the provision, citing several cases for the principle that there is no federal right to bail. The court stated that whether one charged with a felony is to be admitted to bail is a question for the state to decide. The court indicated that the people of Arizona had spoken through their state constitution and that their determination was reasonable. See also, Rendel v. Mummert, 106 Ariz. 233 (1970).

In Parker v. Roth, 202 Neb. 850 (1979), the Nebraska Supreme Court rejected an attack on the constitutionality of a 1978 amendment to the Nebraska Constitution which provides for the denial of bail to persons accused of certain sexual offenses. After an exhaustive discussion of the history of bail, the court concluded that the right to bail is not a fundamental right guaranteed under the Constitution. The court expressly rejected each of the following constitutional arguments: that the 1978 bail amendment violated the (1) excessive bail prohibition and cruel and unusual punishment clause of the Eighth Amendment; (2) the Equal Protection Clause and the presumption of innocence protected by the Due Process Clause of the Fourteenth Amendment and, (3) the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

This Nebraska Constitutional provision has subsequently been declared unconstitutional by the United States Court of Appeals for the Eighth Circuit. Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), appeal docketed, No. 80-2165, 50 U.S.L.W. 3052 (U.S. June 22, 1981). The court indicated that the decisive factor was that "the Nebraska procedures provide for no inquiry into the dangerousness of the individual . . . ." The fatal flaw was that pretrial detention was mandatory for every individual in the class of persons charged with certain crimes. H. 7176 is sharply distinguishable from the Nebraska scheme, because judicial discretion is retained in the case of every individual defendant under H. 7176. Furthermore, the United States Supreme Court will review the decision of the Eight Circuit Court in Hunt.

Based on the language of the excessive bail clause of the Eighth Amendment, its historical development, and judicial interpretations, it is clear that there is no absolute right to bail. The states are free to define those offenses which are bailable as of right and those that are not. There is no constitutional requirement that such determination be made on the basis of whether or not the penalty is capital, so long as that determination is reasonable. Certainly, it is reasonable for the legislature to authorize bail revocation in carefully limited circumstances such as those contained in H.7176, for the legitimate state purpose of public protection.

In conclusion, the provision of H.7176 which authorizes revocation of bail does not violate the excessive bail clause of the Eighth Amendment to the United States Constitution.

## III. H. 7176 Does Not Violate the Excessive Bail Clause of Article XXVI of the Massachusetts Constitition

The only applicable provision of the Constitution of the Commonwealth of Massachusetts which expressly concerns bail is Article XXVI of the Declaration of Rights, which provides in pertinent part that:

> "No magistrate or court of law,
> shall demand excessive bail...."

Like the Eighth Amendment to the United States Constitution, Article XXVI merely prohibits "excessive" bail and does not establish a right to bail in all cases. Article XXVI does not mention, much less contain any distinction between capital and non-capital cases.

In Commonwealth v. Baker, 343 Mass. 162 (1961), the Supreme Judicial Court held that bail is discretionary in first-degree murder cases. The court traced the history of bail at some length and concluded that:

> "...the practice in this Commonwealth in colonial times (as evidenced by S18 of the "Body of Liberties") [of 1641] was that in capital crimes bail was permissible in the discretion of the court. There is every reason to believe that this usage and practice, which was deeply imbedded in our law prior to the Revolution, and is consistent with common law traditions, continued to be part of our law thereafter. The most likely method of abrogating this usage would be by statute as the Legislature has done in the case of treason, or constitutional provision; but neither our statutes nor Constitution does so." (emphasis added). Id. at 168.

The holding in this case rested solely on statutory law, and the court clearly indicated that the legislature may, by statute, define those circumstances in which bail may be made discretionary. As noted previously, the court has reaffirmed this holding in Carrion, supra (1976) and in Marshall, supra (1977).

Given that the legislature's power to make bail discretionary in capital cases does not violate Article XXVI, it follows that the legislature also has the power to make bail discretionary in non-capital cases, because Article XXVI contains no distinction to the contrary. Thus, the legislature is free to alter G.L. c. 276, §58 to authorize discretionary bail revocation in the rational and reasonable manner proposed in H. 7176, without running afoul of the excessive bail clause of Article XXVI of the Massachusetts Constitution.

Strong support for this view is found in United States v. Edwards, No. 80-294, No. 80-401 (D.C. Ct. App., decided May 8, 1981, petition for *cert.* filed). In a comprehensive analysis of colonial and state bail rights relative to the federal constitutional excessive bail clause, the court stated:

> "The Massachusetts Constitution of 1780 included an excessive bail clause, but the right to bail itself was relegated to statutory status. This excessive bail clause makes clear that it was intended as a limitation on the judiciary and not the legislature. . . " (Emphasis added.) *Id.* at 13.

## IV. H. 7176 Does Not Violate the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution

The Eighth Amendment to the United States Constitution protects individuals convicted of crimes from the infliction of "cruel and unusual punishment." U.S. Const., Amend. VIII. But the cruel and unusual punishment clause of the Eighth Amendment is inapplicable to the claims of pretrial detainees. See Bell v. Wolfish, 441 U.S. 520, 535 n. 16 (1977).

Unlike a convicted inmate, a person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a "judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest", which is required by the Fourth Amendment. Gerstein v. Pugh, 420 U.S. 103, 114 (1975). The United States Supreme Court has clearly stated that Eighth Amendment scrutiny is inapplicable to the claims of those who have not been convicted of a crime.

> " [T] he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." Ingraham v. Wright, 430 U.S. 651, 671-672 n.40 (1977).

Therefore, H. 7176 clearly does not violate the cruel and unusual punishment clause of the Eighth Amendment.

## V. H. 7176 Does Not Violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution

The due process clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No state shall . . . deprive any person of . . . liberty . . . without due process of law . . . ."

In evaluating the constitutionality of restrictions of pretrial detention that implicate the protection of liberty without due process of law, the proper inquiry is whether those conditions amount to punishment of the detainee. Due process requires that a detainee not be punished prior to conviction. Bell v. Wolfish 441 U.S. 520, 535 n. 16 (1977).

The Commonwealth presently may detain a person prior to trial for the purpose of ensuring his presence at trial if he cannot make bail or is charged with first-degree murder. Such a person has not been convicted, but has had a judicial determination of probable cause. Gerstein v. Pugh, supra. He has also had a bail hearing under the provisions of G.L. c. 276 §58. The fact of incarceration prior to trial does not, per se, constitute unconstitutional punishment in these circumstances.

There is no reason, therefore, why pretrial incarceration for a different purpose, i.e. public protection, would necessarily constitute unconstitutional punishment. The persons affected by H. 7176 would also have been protected by the probable cause standard, as it applies to a violation of conditional release by the commission of a crime, and they also would have had a bail hearing.

Whether the conditions or restrictions in a particular institution amount to unconstitutional punishment is an entirely separate issue which can only be determined on a case by case basis. But pretrial confindment, per se, does not constitute punishment which is prohibited by the due process clause. Nor does every disability imposed during pretrial detention amount to "punishment" in the constitutional sense. Bell v. Wolfish, supra, 536-537. In United States v. Edwards, No. 80-294, No. 80-401 (D.C. Ct. App., decided May 8, 1981, applic. for cert. pending), the court concluded that pretrial detention is regulatory rather than penal in nature, and therefore not punishment in the constitutional sense.

Similarly, in Bell v. Wolfish, the Supreme Court rejected the claims of pretrial detainees in the District of Columbia that crowded "double-bunking" conditions amounted to unconstitutional punishment. The court noted that its conclusion was buttressed by the sixty-day limitation on the length of pretrial confinement. Id. at 543. H. 7176 contains precisely the same limitation of sixty days.

The Court also expressly rejected the "compelling necessity" standard and further noted that it" . . . need not decide whether we agree with the reasoning and conclusions of . . . " several lower court decisions concerning this issue, and specifically cited Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (Mass. 1973), which involved similar issues regarding pretrial detainees in Massachusetts. Id., 532, 543-44 n. 27.

In conclusion, the bail revocation provision of H. 7176 does not violate the constitutional prohibition against punishment which is derived from the due process clause of the Fourteenth Amendment.

# STATEMENT OF

TYCE S. SMITH,
Attorney
Waynesville, Missouri

JAMES W. REILLEY
Attorney
Chicago, Illinois

Before the

Subcommittee on the Constitution

Senate Judiciary Committee

on

## S.1554, Preventive Detention and Proposals to Repeal the Judiciary Act of 1789

OCTOBER 21, 1981

Mr. Chairman and Members of the Subcommittee.

We wish to thank the committee for an opportunity to present testimony concerning Bill Number S. 1554. In the fall of 1972 we did a study[1] of the Illinois Bail Act of 1964[2] comparing it to the Federal Bail Reform Act of 1966[3]. As a result of that analysis certain recommendations were made relative to possible improvements of the Illinois State Bail System by conforming it to the Federal Bail System. The Conclusion section of our report opened with a statement of what was at that time considered an ideal bail relief system.[4]

> The ideal situation is to have a well-informed judge with a broad discretion make an unhurried determination of the pre-trial release condition necessary to insure the appearance of a particular defendant. The Illinois bond reform was a brave step, but as a working system there are some observable weaknesses which must be corrected.
>
> What is recommended is to give the judge setting bail all the tools he needs: Proper information, a selection of all possible pre-trial release procedures, and tools for vigorous enforcement and prosecution of bond jumpers.

Among the recommendations we made for improvement of the Illinois Bail System was the suggestion that it include all elements of the Federal system, including surety bonds in order to ensure the requisite judicial discretion.[5] In view of the Congressional consideration of amendments to the Federal Bail Reform Act, we have expanded our study to examine the federal bail system.

Our testimony will address itself to that portion of the bill eliminating all forms of cash bonds. Since preventive-detention elements have been previously discussed, we will avoid reference to those aspects of the bill except where relevant to cash bonds in general.

Our research indicates the following basic conclusions which we will explain in some detail in our discussion:

1. The federal bail system is functioning extremely well.
2. The major bail abuses facing the country are not in the federal system but in the underfinanced and overworked criminal justice system of large population centers.

The broad direction granted federal judges in choosing alternative means for granting pretrial release is well utilized and has contributed to the success of the system.

4. The preventive detention system set out in S. 1554 would increase the options available to the judge and give him the means to accommodate concerns for community safety as well as for appearance of defendants at trial.

5. The direct correlation between forfeiture rates and rearrests while on bond indicate that a combination of a preventive detention system along with all present options is the most viable alternative.

6. Elimination of broad judicial discretion in granting bail would set an unworkable example for the states to follow. Because of the lack of resources at the state level to investigate individual defendants, a variety of forms of release for a judge to choose from-including surety bond-is even more important than in the federal system. Further, the availability of funds from forfeited bail would supply financial means for local jurisdiction to locate and prosecute fugitives.

The 1966 Federal Bail Reform Act was created and evaluated solely on the question of whether or not a defendant would appear in court. The reason for its passage was evident in view of the statistics demonstrating the large portion of accused who were unable to make bond, and the inequities of bail release:[6]

| | Felony defendants unable to make bail (percent) |
|---|---|
| Large Counties: | |
| Cook (Chicago) | 75 |
| Hennepin (Minneapolis) | 71 |
| Jefferson (Louisville) | 30 |
| Philadelphia (Philadelphia) | 14 |
| Small Counties: | |
| Brown, Kansas | 93 |
| Rutland, Vermont | 83 |
| Putnam, Missouri | 36 |
| Anchorage, Alaska | 28 |
| Catoosa, Georgia | 6 |

It should be noted that elimination of surety bondsmen in Cook County did not make the radical changes that were anticipated. As an article at page 58 of the Chicago Sun-Times dated April 25, 1975, entitled "Inside Justice" noted: "Only about half the men indicted for crimes in Cook County make bail in the first place."

The Vera Study [7] gave rise to a movement which resulted in the 1966 Federal Bail Reform Act. As this subcommittee well knows, the judicial criteria for release under that Act is "what conditions will reasonably assure that the suspect will appear for trial?"

Soon after the passage of the 1966 Federal Act another philosophy of bail release gathered substantial strength. Senator Edward M. Kennedy distinguished the two positions on this issue as follows[8]:

> II. THE BAIL REFORM DEBATE
> During the past decade, the debate concerning appropriate bail procedures has intensified. On one side of the debate are those who advocate retention of the present bail system, which is grounded in the traditional notion of likelihood of flight. This approach is followed by most federal and state statutes which specify that judges, in deciding whether to permit a suspect's release on bail, may consider only those factors necessary to secure his appearance at future court proceedings. On the other side of the debate are those who champion a substantial modification of the present bail system to permit the court to consider community safety in determining whether bail should be granted in a given case. Under this approach, judges are permitted to consider the potential threat the defendant poses to the community to which he returns. (Footnotes omitted).

The "community safety" position has engendered Bill Number S.1554's rationale which has been eloquently expressed to this subcommittee by Senators Kassenbaum, Chiles, Hatch, Thurmond, Biden, and others, on the following general concerns:

(1) Commissions of additional crimes by those being released on bail, especially of a violent nature;

(2) The judicial philosophy of the bail reform act which mandates that a federal judicial officer when setting bail may only consider those factors which are likely to secure a suspect's appearance in court;

(3) The suspect's failure to appear for court proceedings.

In contrast, the proposed act with preventive detention options applicable to the narcotics offender, seems to vest the acting judicial officer with the necessary discretion to protect the community from the recidivistic or potentially dangerous accused, especially when combined with the provisions of the proposed Pre-trial Release Agency Act. Therefore, we would join Professor Daniel J. Freed in the concern he expressed to this subcommittee regarding the complete excision of money bail in the new act. The 1966 Bail Reform Act has worked effectively for over a decade with neither Professor Freed or ourselves being aware of any study to the contrary.

In fact, the ten pilot projects of the Pretrial Service Agencies have generated statistics that the system as operative is quite effective. Of some 50,000 defendants processed in the ten circuits, the following statistics were compiled:

| Year | Percentage of defendants failing to appear in court | Percentage of persons on bail arrested for new crime |
|---|---|---|
| 1976 | 6.9% | 6.9% |
| 1977 | 6.6% | 5.8% |
| 1978 | 5.6% | 3.4% |
| 1979 | 4.6% | 2.6% |
| 1980 | 3.0% | 2.0% |

For two specific districts, the following data exists:

WESTERN DISTRICT OF MISSOURI (Kansas City)

Period 1976-1980

| No. of Defendants Eligible for Release | No. of Defendants Released | New Arrests Number/% | Failure to Appear Number/% |
|---|---|---|---|
| 1,451 | 1,257 | 39/3.1% | 15/1.2% |

NORTHERN DISTRICT OF ILLINOIS (Chicago)

Period October 6, 1979 through March 1981

| No. of Defendants Eligible for Release | No. of Defendants Released | New Arrests Number/% | Failure to Appear Number/% |
|---|---|---|---|
| 3,974 | 3,664 | 193/5.2% | 155/4.2% |

The figures for the Western District of Missouri Pretrial Services Agency are of special importance because this District utilized all available forms of release as shown here:

TYPE BAIL SET (BY PERCENT)
WESTERN DISTRICT OF MISSOURI

| | PR | UNSECURED | 10% | CASH OR SURETY |
|---|---|---|---|---|
| 1976 | 9.7% | 42.4% | 11.9% | 36% |
| 1977 | 13.5% | 45% | 10% | 31.5% |
| 1978 | 17.5% | 38.2% | 13.8% | 30.5% |
| 1979 | 24.5% | 42.6% | 5% | 27.9% |
| 1980 | 22.8% | 29.8% | 9.6% | 37.8% |

By either of the two previously established criteria the Federal Bail System operating in conjunction with the Pretrial Services Agency was extremely successful. It must be supposed that it was uniformly successful throughout the ten pilot districts.

In addition, the following figures are significant to this subcommittee:

(1) Over the life of the project, 50% of all bond forfeitures were charged narcotic offenders;

(2) Surprisingly, some 50% of all the accused who were arrested fo an additional crime while on bail were offenders charged with so-called "white collar crimes" as defined by the Justice Department.

The preventive detention option would allow the court to prevent the bail abuses by major narcotic offenders as described by Senator Chiles. Senator Chiles' testimony makes it evident that a Failure to Appear Criteria must be included in any operative bail system. We would suggest that it is possible to combine the "community safety" and "the appearance" options in one bill. This can be done by striking from the present bill the provision eliminating money bail and adding to the proposed bill all of the release provisions of the 1966 Federal Bail Reform Act, including the 10% deposit and compensated surety provisions. These measures will allow a presumably qualified judicial officer the discretionary options necessary to protect the community and provide for the accused's probable appearance at court by considering the personal history and the charged offense of an individual accused.

Most of the furor given rise to Bill S.1554 is caused not by abuse of the Federal Bail System but by abuses of state bail systems, the larger municipalities being the most common source. Utilizing the Failure To Appear evaluation employed in our first study, a review of recent statistics from Chicago's Cook County area demonstrates the difficulties confronting such a state bail system:

Money bonds written in Cook County-- full cash and 10% deposit (Illinois does not allow surety bonds)

| Year | Number of Bonds-Full cash and 10% |
|---|---|
| 1977-1978 | 359,856 |
| 1978-1979 | 377,000 |
| 1979-1980 | 400,839 |
| 1980-1981 | 402,293 |

The bond and forfeiture statistics of Cook County, Illinois other than Chicago are very revealing:[9] (D,C & I indicate cash bonds, 10% deposit bonds, and signature or own recognizance bonds respectively)

Circuit Court of Cook County

BAIL BONDS POSTED AND FORFEITED
Municipal Department-Districts 2-6
Most recent five-year period
Report date: Oct. 15, 1981

| | | 1980 | 1979 | 1978 | 1977 | 1976 | Aggregate |
|---|---|---|---|---|---|---|---|
| POSTED | (C | 98898 | 84998 | 78818 | 72874 | 67079 | 402667 |
| | (D | 47847 | 41895 | 39138 | 38135 | 40448 | 207463 |
| | (I | 14242 | 12325 | 13198 | 12483 | 8582 | 61330 |
| FORFEITED | (C | 944 | 667 | 1300 | 871 | 560 | 4342 |
| | (D | 9346 | 9247 | 8232 | 7420 | 7080 | 41325 |
| | (I | 3767 | 3400 | 3284 | 2398 | 2178 | 15027 |
| FORFEITURE RATE | (C | 1.0% | 0.8% | 1.6% | 1.2% | 0.8% | 1.1% |
| | (D | 19.5% | 22.1% | 21.0% | 19.5% | 17.5% | 19.9% |
| | (I | 26.4% | 26.5% | 24.9% | 19.2% | 25.4% | 24.5% |

Cash and 10% deposit forfeitures in Judicial District 1 or Chicago for 1980 shows an overall forfeiture rate of 21% while the other five judicial districts of Cook County for Illinois for the same year demonstrate a forfeiture rate of 3% to 4%. In Chicago in 1981 the forfeiture rate on cash and 10% deposit forfeitures fluctuated from 8% in March to 27% in April. Recent figures for I bond or personal signature bond forfeitures for Chicago are not available.

These statistics indicate that presently, at least in Cook County, the failure to appear rates of the Chicago courts are substantially higher than those of the suburban courts.

The importance of the forfeiture statistics or as they are more commonly known "Failure to Appear" is made evident in "Alternatives to Pretrial Detention" a study funded by the National Institute of Law Enforcement and Criminal Justice Law Enforcement Assistance Administration[10] which establishes on page 79 a direct correlation between "Failure to Appear" and re-arrests while on bond. Providing that re-arrests are an element of pretrial release the following is assumed:

It is probable that re-arrests will exceed willful failures to appear in the following pattern:

| FTA Rate per Exposure Days | Ratio of Arrests to FTAs |
|---|---|
| Under .5 | 4 to 1 |
| .5 to 1.0 | 3 to 1 |
| 1.0 to 2.0 | 2 to 1 |
| Above 2.0 | 1 to 1 |

Certainly in view of the proposed Act and the testimony of prominent Senators before this subcommittee, re-arrest statistics are of great importance.

Utilizing this correlation, Chicago would have a re-arrest ratio in excess of 20% of those released on bond. Senator Edward M. Kennedy, in a recent law journal article[11] cites a recent District of Columbia study showing a re-arrest figure of 13%. Of course, it is evident that the District of Columbia is analogous to the large municipalities of state courts.

The study[12] cited above relative to the Failure to Appear and re-arrest correlation also cites certain re-arrest and Failure to Appear statistics for Washington D.C., Memphis and Shelby County, Tennessee, Mecklenburg County, South Carolina which includes Charlotte, and Santa Clara County, California. The article presented these figures and commented on them as follows:

Felons vs. Misdemeanants

| | Misdemeanants | Felons | Total |
|---|---|---|---|
| D.C. (rearrest) | 8.3 | 17.0 | 11.7 |
| Mecklenburg - FTA | 10.1 | 11.3 | 10.2 |
| Rearrest | 9.7 | 10.6 | 9.8 |
| Memphis - FTA | 14.0 | 17.2 | 15.6 |
| S.C. - FTA | 6.0 | 7.0 | 6.5 |
| Rearrest | 5.0 | 7.0 | 6.0 |

Property v. Persons

D.C. found that "violent offenders" (homicide and assault with dangerous weapon) were rearrested as often as non-violent, and that "dangerous offenders" (robbery, burglary, rape, arson, and drug offenses) were arrested three times as often as non-dangerous. But all of the "violent" and "dangerous" cases were felonies and three-fourths of the "others" were misdemeanants - so that the time factor probably explains a great part of these differences.

Contrary to D.C., Memphis experience was as shown here:

| Felony Cases | Failure to Appear | Rearrest |
|---|---|---|
| Against Person | 8% | 11% |
| Others | 20% | 23% |

Percent Rearrested (D.C.)

| | Felons | Felons and Misdemeants |
|---|---|---|
| Prior Record | 26.3 | 12.1 |
| No Prior Record | 17.0 | 11.7 |

Mecklenburg County

| | FTA* | Rearrested |
|---|---|---|
| Two or More Prior Arrests | 17.8 | 15.5 |
| One or 0 Prior Arrest | 7.4 | 6.6 |

*Includes both "willful" and other failures.

The study did not attach much significance to the statistics quoted above; however, it should be noted that neither did the study attach importance to the re-arrest statistics which have initiated so much of the testimony before this subcommittee.

We are two attorneys who have substantial experience both state and federal in many jurisdictions. James Reilley is presently practicing in Chicago, Illinois and Tyce Smith in Pulaski County, Missouri. We suggest that prior to enacting the legislation as proposed, the trickle-down effect relative to the State Criminal Jurisdiction must be considered, as a majority of the fifty states have enacted all or substantial portion of the Federal Bail Reform Act. Much of the testimony before this subcommittee would indicate that this downward influence is one of the major goals of this bill.

We are afraid that the radical modifications of this bill will cause eradication of an efficiently operating system. Professor Freed, once a major opponent of money bail in any form, has advocated modification of action to this subcommittee and has argued for all forms of presently existing money release options, including the professional surety.

This subcommittee should recognize that the Federal Bail System, relative to State system, has advantages in the amount of available funds, manpower available, and a comparatively smaller caseload. Economically, larger municipalities cannot sustain the additional economic requirements of this bill.

We would suggest that with the forms of money bail the Federal, State and local jurisdiction would receive some monies to compensate for the additional substantial enforcement and retrieval expenditures occasioned by a defendant's flight. In the case of a compensated surety the money would be the total amount of the bond or the performance of the retrieval function by the bondsman.

The probable correlation between "failures to appear" and rearrests would make it plain that both the "community safety" and "defendant appearance" concerns are viable. The above are simply two ways of looking at the same problem and are mutually compatible under the amendment we suggest.

## CONCLUSIONS

Bill Number S.1554 should be amended to include all forms of release available to the court under the Federal Bail Reform Act of 1966. The 1966 release provisions, plus the preventive detention and other release options of Bill S.1554, would invest an acting judicial officer with broad enough discretion to consider and protect the community safety, the defendant's rights and the trial court's efficiency.

Respectfully submitted,

TYCE S. SMITH

JAMES W. REILLEY

## FOOTNOTES

(1) T. Smith & J. Reilley, "The Illinois Bail System: A Second Look" 6 John Marshall Journal of Practice and Procedure 33 (1972)

(2) Ill. Rev. Stat, Ch. 38 § 32-10 (1971)

(3) 18 U.S.C. § 3146

(4) Note 1 supra at 47

(5) Note 1 supra at pages 45-46

(6) The President's Commission on Law Enforcement and Administration of Justice "Task Force Report: The Courts" page 37 (1967)

(7) Ares, Rankin and Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole" 38 N.Y.U.L. 67 (1963); Schaeffer, "Report on Bail and Parole Jumping in Manhattan" VERA INSTITUTE OF JUSTICE (1970)

(8) E. Kennedy, "A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform" 48 Fordham L Rev 423 at pages 426-427 (1980)

(9) Cook County Clerk's Statistical Reports for Bonds, Cases, Fees, Fines and Costs, December 1, "1975-1978" and "1977-1980"

(10) National Institute of Law Enforcement and Criminal Justice Law Enforcement Assistance Administration, United States Department of Justice, "Instead of Jail: Pre and Post-Trial Alternatives to Jail Incarceration" Alternatives to Pretrial Detention (1977)

(11) Note 8 supra at page 423

(12) Note 9 supra at page 79

# TESTIMONY OF FLOYD E. MINCEY

ON BEHALF OF

# FLORIDA SURETY AGENTS ASSOCIATION, INC.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I AM HERE TODAY BECAUSE I SHARE A GREAT CONCERN WITH SENATE BILL 1554 AS IT ASKS FOR ELIMINATION OF SURETY BONDS. IF PASSED IN ITS PRESENT FORM CORPORATE SURETY BONDS AS A FORM OF PRETRIAL RELEASE WOULD NO LONGER EXIST IN THE FEDERAL COURT SYSTEM. THIS METHOD OF PRETRIAL RELEASE HAS SERVED A USEFUL PURPOSE FOR OVER 200 YEARS. THERE IS STILL A NEED FOR IT TODAY.

AS CHAIRMAN OF THE LEGISLATIVE COMMITTEE OF THE FLORIDA SURETY AGENTS ASSOCIATION AND A MEMBER OF THIS ASSOCIATION SINCE ITS BEGINNING, AS A LICENSED AGENT SINCE 1953 I HAVE ACTIVELY PARTICIPATED IN PROPOSING AND SUPPORTING LEGISLATION TO CORRECT ABUSES IN THE SYSTEM. MY EXPERIENCE HAS BEEN AS AGENT IN A LOCAL OFFICE AND AS GENERAL AGENT SUPERVISING MANY AGENTS IN SIX STATES AND THE LAST TEN YEARS AS OFFICER AND DIRECTOR OF A SURETY INSURANCE COMPANY. FLORIDA NOW HAS BASIC CERTIFICATION FOR LIMITED SURETY AGENTS BEFORE THEY CAN OBTAIN A LICENSE WHICH INVOLVES IN CLASS TRAINING COVERING LAWS, RULES AND REGULATIONS OF THE BUSINESS.

THE FLORIDA SURETY AGENTS ASSOCIATION STRONGLY OPPOSES THE ELMINATION OF SURETY BONDS AS A VIABLE ALTERNATIVE METHOD OF PRETRIAL RELEASE.

OTHER FORMS OF RELEASE PROGRAMS HAVE TAKEN CREDIT FOR SAVING MILLIONS OF DOLLARS FOR THE TAXPAYER. I HAVE NOT SEEN ONE BUDGET DROP - ONLY ESCALATE. IF IN FACT THAT IS SAVING TAX DOLLARS THEN WE MAY BE SURE THE SURETY BOND SYSTEM OVER 200 YEARS HAS SAVED THE TAXPAYERS BILLIONS OF DOLLARS SINCE IT IS OPERATED BY FREE ENTERPRISE AND NOT BY THEIR TAX DOLLARS.

There will be two choices - release on a promise to appear with additional promises that the accused will not violate conditions of the release or detention until trial.

Should the accused fail to appear or violate the terms of release who will be responsible for locating and rearresting the no show?

It has been proven across this country that a "promise to appear doesn't work as proponents believed it would. No shows across the land are from 10% to as high as 60% depending on how often it is used, the locality and the charges involved. Surety bondsman could not survive with that high a no show rate because those they do not rearrest they would pay the full amount of bail posted to the court. (see Attached Article "A")

Failure to appear and getting away with it makes a mockery of our court system. No shows on other forms of release require additional law enforcement with powers of arrest to locate and rearrest beginning the process all over again. Had the surety posted a bond they would bear the cost of location and apprehension.

When a promise to appear bond is posted for $5,000. and the accused fails to appear, how does the court collect the $5000. promise from someone that has fled?

Right here in Washington, D. C. you have the D. C. Bail Agency which began under the 1966 Bail Reform Act with a staff of 4, a grant of $75,000. in 1967 and in 1976 the cost to the taxpayers of this nation for this program had increased to 61

STAFF AND A BUDGET OF $756,950. THEY REQUESTED ADDITIONAL FUNDS TO SET UP AN APPREHENSION UNIT TO PICK UP NO SHOWS. DID THIS SYSTEM, WHICH ELIMINATED LOCAL BONDING AGENTS, ACCOMPLISH A BETTER APPEARANCE RECORD, A REDUCTION IN CRIME, A REDUCTION IN RECIDIVISM AND SWIFT, SPEEDY ADJUDICATION OF CASES? I THINK NOT. IT IS TRULY A REVOLVING DOOR AND FREE BAIL IS MORE OF AN INCENTIVE TO COMMIT CRIME THAN KNOWING YOU HAVE TO PAY A BONDSMAN A PREMIUM FOR YOUR BOND AND THAT HE WILL HUNT YOU DOWN IF YOU FAIL TO SHOW IN COURT. (SEE ATTACHED "B" & "C")

WHY NOT CHOOSE A LIFE OF CRIME --TODAY THERE IS NO SURE PUNISHMENT--A GOOD CHANCE YOU WILL NEVER BE TRIED BECAUSE OF ALL THE LAWS PROTECTING THE ACCUSEDS' RIGHTS--PLEA BARGAINING TO CLEAR COURT DOCKETS AND EMPTY JAILS--ALL SORTS OF PROGRAMS TO DIVERT THE ACCUSED FROM APPEARING AT A TRIAL AND "ACCEPTABLE" EXCUSES FOR VIOLATING THE LAW. ALL OF THIS INCLUDING FREE LEGAL COUNSEL AND IT COST YOU NOTHING. (SEE ATTACHED ARTICLE "D")

AN ACCUSED FELON RELEASED ON A PROMISE, WITH OR WITHOUT CONDITIONS WILL TAKE A CHANCE ON NOT APPEARING BECAUSE MOST PEOPLE ARE AWARE LAW ENFORCEMENT HAS IT HANDS FULL AND THE LIKELIHOOD OF BEING APPREHENDED RIGHT AWAY IS NIL. BY THE TIME YOU ARE RE-ARRESTED PERHAPS WITNESSES AND THE OFFICERS INVOLVED ARE GONE AND YOU CAN BEAT THE CASE. HERE AGAIN, ON A SURETY BOND THE AGENT WOULD MAKE EVERY EFFORT TO PRODUCE THE DEFENDANT IN COURT.

UNDER OUR STATE LAWS THE SURETY IS GIVEN THE INCENTIVE TO CONTINUE SEARCHING AND RETURN THE DEFENDANT EVEN AFTER THE FORFEITURE HAS BEEN PAID IN THE TIME PRESCRIBED BY EACH STATE LAW. SOME STATES ALLOW ONE YEAR OTHERS THREE YEARS TO SURRENDER THE

DEFENDANT AND RECEIVE A REFUND OF THE LOSS PAID. JUSTICE IS SERVED AND THE RETURN HAS NOT COST THE CRIMINAL JUSTICE SYSTEM, WHICH IS FUNDED BY TAX DOLLARS.

THE SURETY BOND SYSTEM ALLOWS A MIDDLE GROUND BY GIVING THE ACCUSED THE CHOICE OF POSTING A SURETY BOND OR BEING HELD UNTIL A HEARING IS HELD TO SEE IF A RELEASE ON A PROMISE TO APPEAR WILL BE GRANTED. THE SURETY RECEIVES A PREMIUM FOR THIS SERVICE THE SAME AS AN ATTORNEY, DOCTOR OR DENTIST, THE FEE IS NOT REFUNDABLE, THE ONE NEEDING THE SERVICE PAYS THE COSTS. THE SURETY WILL KEEP IN TOUCH WITH THE DEFENDANT, THE COURT AND ATTORNEY TO BE SURE EVERYONE KNOWS THE COURT DATE. THEY ALSO TELL THE DEFENDANT WHILE OUT ON BOND THEY HAD BETTER STAY OUT OF TROUBLE BECAUSE THEY COULD JEOPARDIZE THE CHANCE OF REMAINING FREE ON BOND BEFORE TRIAL. NATURALLY, ALL DO NOT HEED OUR ADVICE, HOWEVER THEY SOMETIMES FIND IT HARD TO GET A BOND WRITTEN ON SECOND AND THIRD SERIOUS OFFENSES THEY MAY BE CHARGED WITH WHILE UNDER BOND.

THE INSURANCE COMPANY THAT IS LICENSED TO WRITE SURETY BONDS IS GOVERNED BY STATE INSURANCE DEPARTMENTS THAT FOR THE MOST PART ARE STRICT IN ENFORCING THE PROVISIONS OF THE LAW AS TO FINANCIAL STABILITY OF THE SURETY. FREE ENTERPRISE MADE THIS COUNTRY GREAT AND THERE IS NO NEED TO HAVE GOVERNMENT OPERATED BONDING. TO REPLACE SURETY AGENTS THE COST WILL BE OVERWHELMING AND THE NUMBER OF GOVERNMENT EMPLOYEES TO OPERATE IT WILL BE GREAT.

OTHER METHODS OF RELEASE PLACE THE FULL COST OF OPERATION ON THE ALREADY OVERBURDENED LAW ABIDING TAXPAYER WHO IS THE VICTIM OF CRIME AND IS GETTING MIGHTY TIRED. THOSE WHO PAY TAXES AND CHOOSE TO VIOLATE OUR LAWS ARE IN THE MINORITY AND HAVE HAD

ALL THE BREAKS. IT IS TIME FOR THE MAJORITY TO BE RELIEVED OF ADDITIONAL EXPENSES CAUSED BY THOSE WHO COMMIT CRIMES.

AN 8 HOUR A DAY RELEASE OFFICER WILL COLLECT A PAYCHECK AT THE END OF THE WEEK WHETHER HE RELEASES 1 OR 100 ACCUSED CRIMINALS AND IF 50 DON'T SHOW UP FOR COURT IT WON'T STOP THE PAYCHECK. THERE IS NO VESTED INTEREST AND THE NO SHOW RATIO CAN BE KEPT LOOKING GOOD BY USE OF NO INFORMATION OR NOLLE PROSSE TO CLOSE THE CASES OUT. STATISTICS WILL SHOW A GOOD RETURN BECAUSE MANY CASES ARE DROPPED SHOWING AS CLOSED, NOT AS NO SHOWS. THERE HAVE BEEN MORE STUDIES SINCE THE 1960'S ON BAIL AND WE DON'T NEED MORE OF THEM. WHAT WE DO NEED IS AN OPPORTUNITY TO GIVE INPUT TO THOSE WHO MAKE THE LAWS GOVERNING RELEASE WITH THE HOPE WE CAN COME TO A CONCLUSION THAT BENEFITS ALL.

THERE IS A SERIOUS PROBLEM - WHAT WILL YOU DO WITH THOSE YOU ORDER DETAINED? THE JAILS ARE FULL NOW. COUNTY JAILS ARE OVERFLOWING WITH INMATES BECAUSE THEY ALSO HOUSE FEDERAL PRISONERS. OVER THE PAST 15 TO 20 YEARS WE HAVE NOT KEPT UP WITH BUILDING NEW PRISONS AND JAILS AND ARE TOO LENIENT WITH OFFENDERS. THE FACILITIES DO NOT NEED TO BE LIKE "THE RITZ", THEY SHOULD BE CLEAN, WITH THE ESSENTIALS OF LIFE AND RESPONSIBLE DUTIES TO BE FULFILLED BY EACH INMATE. OUR SERVICEMEN DEFENDING OUR FREEDOM HAVE BEEN HOUSED A LOT LESS COMFORTABLY THAN THOSE SERVING TIME IN MANY OF OUR FEDERAL PRISONS.

WHY NOT USE THE MONEY THAT IT WOULD TAKE TO OPERATE A FREE GOVERNMENT BAIL SYSTEM AND PUT IT TO GOOD USE. BUILD PRISONS, PAY DETENTION OFFICERS ENOUGH TO GET QUALIFIED PEOPLE, REQUIRE ALL INMATES TO BE PRODUCTIVE AND CONTRIBUTE TO THEIR BED AND BOARD. THIS WILL HELP REDUCE CRIME, NOT ELIMINATION OF THE SURETY.

IT EVEN RUBS OFF ON OUR JUVENILE COURT SYSTEM, WE DON'T HAVE PROPER FACILITIES IN MANY AREAS TO HOUSE THEM AND GIVE THEM CONSTRUCTIVE INSTRUCTIONS ON HOW TO CONDUCT THEMSELVES IN SOCIETY. THEY KNOW THE CHANCES OF BEING INCARCERATED ARE SMALL AND AFTER HEARING THE JUDGE SAY "IF YOU APPEAR BEFORE ME AGAIN I WILL HAVE TO SEND YOU TO JUVENILE HALL." THE JUVENILE REAPPEARS AND THE JUDGE FINDS THERE IS NO ROOM AT THE INN. DISRESPECT IS THERE - PRETTY SOON WE HAVE AN ADULT ALREADY ON A ROAD TO CRIME. ANY EXCESS OF TAX DOLLARS SHOULD BE USED IN THIS AREA, NOT ON FREE BAIL PROGRAMS.

IN THE TESTIMONY BEFORE THIS COMMITTEE ON SEPTEMBER 17TH I RECALL A COMMENT THAT IF THE FEDERAL JUDICIARY ELIMINATES SURETY BONDS THE STATES WILL FOLLOW SUIT IN ONE OR TWO YEARS. HAS ANYONE CONSIDERED THE DIFFERENCE BETWEEN FEDERAL AND STATE WHEN IT COMES TO APPREHENSION --THE FEDERAL COURTS HAVE THE FBI, U.S. MARSHALS AND NO STATE BOUNDARY TO WORRY ABOUT. STATES WOULD HAVE TO FILE MANY MORE TIMES CASES FOR EXTRADITION TO BRING FLEEING FELONS BACK. HAD THERE BEEN A SURETY BOND THE BAIL AGENT WOULD HAVE RECOVERED THE NO SHOW AND AT NO COST TO THE STATE. EXTRADITION IS A PROBLEM AND MANY TIMES CASES WILL BE DISMISSED OR EXTRADITION REFUSED OR AN ERROR MADE IN TIMING, RESULTING IN NO TRIAL TO DETERMINE INNOCENCE OR GUILT.

THE PROBLEM OF SOME SURETY AGENTS VIOLATING THE LAWS IS NOT DENIED AND WE HAVE TAKEN SOME HEAVY BLOWS. WE ARE NOT ALONE AS IT HAS AFFECTED LAW ENFORCEMENT OFFICERS, JUDGES, ATTORNEYS, DOCTORS, GOVERNMENT EMPLOYEES, PUBLIC OFFICIALS AND EVERYONE ELSE. THE TEMPTATION TO TAKE A CHANCE, VIOLATE OUR LAWS, WILL ALWAYS BE

WITH US. THE LUCRATIVE DRUG BUSINESS IS A TEMPTATION TO MANY AND SOME FALL VICTIM TO IT. AS AN ASSOCIATION WE HAVE WORKED COOPERATIVELY WITH OUR STATE INSURANCE DEPARTMENT TO INVESTIGATE IRREGULARITIES AND ENCOURAGE CHARGES BE FILED AGAINST THOSE VIOLATING THE LAW. ANY PROFESSION SUFFERS FROM THE MINORITY THAT COMMITS A WRONG AND SURETY BONDSMEN ARE NO DIFFERENT.

LAWS GOVERNING SURETY BONDS HAVE NOT COME EASILY AND MANY HAVE STOOD THE TEST OF COURT DECISIONS THROUGH THE YEARS. LET'S NOT CAST THE ENTIRE SYSTEM ASIDE BECAUSE OF A FEW CASES OF ABUSE. INSTEAD BE SURE LAWS HAVE SEVERE PENALTIES AND DISCOURAGE VIOLATIONS. THERE ARE GOOD PEOPLE IN THE BUSINESS.

SENIOR CITIZENS IN BROWARD COUNTY RECENTLY INTERVIEWED MADE COMMENTS THAT BOTHERED ME AS I WAS BORN AND RAISED THERE. THEY SAID THEY WERE AFRAID TO GO OUT EVEN DURING THE DAY BECAUSE OF MUGGINGS. DOORS AND WINDOWS ARE BARRED AND BOLTED. THEY CAN'T AFFORD TO MOVE. PARKS ARE UNSAFE THAT WERE SAFE WHEN THEY CAME IN THE EARLY 1960'S. WHY HAS THIS HAPPENED? WHAT HAS CHANGED?

WE DO SUPPORT DETENTION OF HARDCORE REPEAT OFFENDERS AND REINSTATEMENT OF THE RIGHT OF A JUDGE TO CONSIDER DANGER OR THREAT TO THE COMMUNITY WHEN DECIDING IF BAIL WILL BE SET OR THE ACCUSED DETAINED. OUR FOREFATHERS SAW THE NEED FOR THE 8TH AMENDMENT AND WE CONCUR.

THE PUBLIC IS CRYING FOR CHANGES IN DEALING WITH CRIMINALS. THEY WANT SOME OF THE SUPER RIGHTS PRESENTLY AFFORDED OFFENDERS.

WE URGE YOU TO CONSIDER AN AMENDMENT TO YOUR BILL LEAVING THE OPTION OF SURETY BONDS FOR PRETRIAL RELEASE IN THE SYSTEM.

IF THIS BILL IS PASSED WITHOUT BEING AMENDED TO RETAIN SURETY BONDS, WHEN THE PEOPLE BACK HOME REALIZE THAT YOU HAVE GIVEN THE CRIMINAL THE GREATEST TOOL TO WORK WITH AGAINST SOCIETY AND THE JUDICIARY AND THE LAW ABIDING TAXPAYER WILL BE PAYING THE BILLS-THEY ARE GOING TO BE UP IN ARMS.

OUR COUNTY IS PRESENTLY IN AN UPROAR OVER INCREASED PROPERTY TAXES WITH THE MAJOR INCREASE IN BUDGET BEING POLICE PROTECTION. WITH ALL THE PROTECTION THEY ARE STILL NOT SAFE. YOUR DECISION WILL BE OF GREAT IMPORTANCE. IT CAN BE A BURDEN TO SOCIETY AND A GIFT TO THE CRIMINAL OR JUST THE OPPOSITE. IT WILL MAKE DRUG SMUGGLERS HAVE NO PROBLEM IN BEING RELEASED.

MOST PEOPLE DON'T KNOW THERE ARE DIFFERENT TYPES OF BAIL REFERRED TO IN THE MEDIA AS SIMPLY BAIL. IT WOULD BE HELPFUL WHEN DISCUSSING BAIL TO KNOW IF IT IS SECURED BY A SURETY BOND, AN UNSECURED PROMISE TO APPEAR OR AN UNSECURED PERSONAL RECOGNIZANCE BOND SET AT $100,000. THERE IS A DIFFERENCE.

THE NATIONAL SHERIFF'S ASSOCIATION ADOPTED A RESOLUTION IN JUNE, 1979 WHICH WE AGREE WITH AND CALL YOUR ATTENTION TO A PART OF THAT:

> "BE IT FURTHER RESOLVED
>
> THE NATIONAL SHERIFFS' ASSOCIATION URGES THAT BOTH THE FEDERAL AND STATE COURT SYSTEMS ELIMINATE THE PROVISIONS ALLOWING THE POSTING OF AN AMOUNT REPRESENTING ONLY 10% OF THE BAIL AMOUNT AND REQUIRE THAT THE FULL AMOUNT OF THE BOND SET BY A JUDICIAL OFFICER BE POSTED AS A CONDITION OF RELEASE, AND"

THIS RESOLUTION I AM SURE WAS ARRIVED AT AFTER CAREFUL CONSIDERATION AND STUDY. IF THEY DON'T WANT 10% HOW WILL THEY FEEL ABOUT HAVING NOTHING?

MY PERSONAL CONVERSATIONS WITH MANY OF THOSE I KNOW IN THE JUDICIARY AT STATE LEVELS ARE OPPOSED TO ELIMINATION OF SURETY BONDS AND WERE UNAWARE OF THIS BILL.

THERE HAVE BEEN MANY HEARINGS AND STUDIES DONE ON THE BAIL BOND BUSINESS OVER THE YEARS AND TO MY KNOWLEDGE AS AN INDUSTRY WE HAVE NOT BEEN AFFORDED AN OPPORTUNITY TO GIVE DIRECT INPUT TO ANY OF THEM. WITH THAT IN MIND I WISH TO THANK THIS COMMITTEE FOR THE OPPORTUNITY TO SHARE THE SURETYS' POINT OF VIEW WITH YOU. THANK YOU FOR YOUR ATTENTION TO THIS SERIOUS PROBLEM.

OUR ASSOCIATION IS AVAILABLE FOR FURTHER DISCUSSION AT YOUR REQUEST.

RESPECTFULLY SUBMITTED,

Floyd E. Mincey
FLOYD E. MINCEY
LEGISLATIVE CHAIRMAN
FLORIDA SURETY AGENTS ASSOCIATION, INC.

Another example of –
Release on Recognizance – "No Money Bail"

HARTFORD COURANT Connecticut
October 24, 1976

# Court Officials Say Bail Policy Failing

By GERALD DEMEUSY
And
BOB LaMAGDELEINE

Judges and prosecutors, faced with new liberalized bail programs, are alarmed by the dramatic increase in the number of criminal suspects who ignore court appearances and thumb their noses at re-arrest warrants.

Most of these "no-shows" are persons released by police without bond after signing written promises to appear in court. About 40 per cent of them were arrested for serious crimes.

Although figures are difficult to get because overworked court personnel can't keep up statiscally with what's happening, estimates are that the problem of trying to bring suspects into court has multiplied by at least 16 times and possibly as much as 120 times in the past decade.

This open defiance of the law is a statewide problem, but it is most severe in Common Pleas Court 14 in Hartfort where criminal cases are pouring in at the rate of 12,000 a year.

Hartford police make an average of 1,000 arrests a month. They allow about 450 (45 percent) of these 1,000 defendants to leave on promises to appear on a designated court date. On the average, 100 defendants (about 22 percent) break that promise, and 36 (about 8 percent) are never seen again.

The "skip rate" of criminal suspects 10 years ago was documented at a half of 1 percent. Compared to the current skip rate in the Hartford Court, the increase is 16-fold.

Bail Commissioner Canio Zaccagnino compiled data indicating that Hartford police during the first nine months of this year released 3,845 of the 8,000 persons they arrested on written promises to appear.

Rearrest warrants had to be issued for 919 of these suspects.

Chief Judge Roman J. Lexton of Common Pleas Court said the "promise to appear" system simply isn't working and that a "crackdown" is in order.

His guess is that as many as 60 percent of those arrested and released after promising to appear are not showing up in court. He said those who claim the system is working do not consider the welter of nolles granted to close out criminal cases after the statute of limitations expires.

If Lexton's guess is correct, the current skip rate would be 120 times greater than that of 10 years ago.

Common Pleas Court Judge John M. Fitzgerald said if an indicator is needed to show a growing contempt for law and order, "this certainly is it."

"And," he said, "there's little doubt its effects are contagious because the problem is worsening all the time."

"ARTICLE "A"

# Suspect, 20, Capitalizes on Bail Flaw

# At 20, He's a Legend In Foiling Bail System

By William L. Claiborne
Washington Post Staff Writer

The Washington Post -- Washington, D. C. October 10, 1971

In just a year, Tex Maynard Lawson has become a legend in Washington's criminal justice system.

He is now known to judges, lawyers, police officials and the D. C. bail agency as the man who holds the unofficial record for most personal recognizance releases here in a year.

Six times since last Oct. 16, Lawson, 20 has been charged with robbery.

Five of those times, he was released by the courts on personal recognizance, once while already out on three personal recognizance releases, and once after pleading guilty to armed robbery.

Once, he was arraingned on a robbery charge and held briefly under $50,000 bail set by a U.S. magistrate. Eleven days later, the same magistrate freed him on personal recognizance, according to records of the D.C. bail agency.

On another occasion, after being arrested for robbery a few blocks from the scene of a street holdup, Lawson was released after posting $30 bail. Three months and five days later, he was charged in another armed robbery.

In the next 2½ months, Lawson was charged with three new armed robberies and one burglary. In all but one of those four cases, he was released by the courts on personal recognizance, which is release without any bond.

"Tex Lawson is a perfect example of someone who can play the criminal justice system against itself," said Dewaine L. Godney Jr., court coordinator for the bail agency.

"But he's not alone. We have many, many other examples," Godney added.

"The system is unable to deal with multiple cases. It hasn't worked. This problem will continue because re-arrests are going up more and more."

The bail agency, created by Congress in the Bail Reform Act of 1966, makes recommendations to judges and magistrates on whether a defendant should be released without bail. Its criteria are the dangerousness of the suspect and whether he has community ties.

Godney was asked about Lawson's extraordinary record after The Washington Post obtained a copy of a confidential memorandum on Lawson prepared within the metropolitan police department.

The memorandum, written by Lt. Chrispen F. Preston, commander of the major violators branch, was sent to Deputy Chief Mahlon E. Pills, commander of the criminal investigations division.

It called Lawson a "major recidivist" and traced his court record from the time when he was 16 years old—Lawson was charged with a yoke robbery and released into the custody of his parents.

Lawson is now in the D.C. jail, awaiting sentencing on a guilty plea to an old robbery charge. His personal recognizance release on other robbery charges has been revoked by the courts.

But between Oct. 16, 1970, and Aug. 20, 1971, Lawson established what bail agency officials said may be a new local record for gaining release after multiple charges.

"The system is designed to treat one criminal case at a time, and it just doesn't work for multiple cases," said Godney, by way of explaining Lawson's repeated releases.

"He's been before many different judges, and each one treated him as a different case. The system just doesn't seem to be able to react to extreme cases of multiple offenses," Godney said.

In addition, Godney said, Lawson "has had nearly as many lawyers as he has had charges.

"He's famous around here, but there are others as well. He's not alone in getting easy releases over and over again," Godney said.

One of five children, Lawson dropped out of high school after the 11th grade and, according to the bail agency, had worked at a number of jobs, such as trash collector, porter and tire changer. His criminal record reflected heroin use, according to police.

Last January, he told bail agency officials that he was living with his mother but they have been unable to locate her.

He first came to the attention of police in August, 1968, when he was 16. The police department memo outlines a series of run-ins with police, resulting in release to his parents.

On Aug. 26, 1970, shortly after his 18th birthday, Lawson was charged with his first adult offense possession of narcotics paraphernalia. The case was dismissed at the request of an assistant U.S. attorney because of an illegal search.

Lawson's court experiences over the next 10 months have been reconstructed from records on file in the police department and the D.C. bail agency.

- On Oct. 16, 1970, he was

continued --

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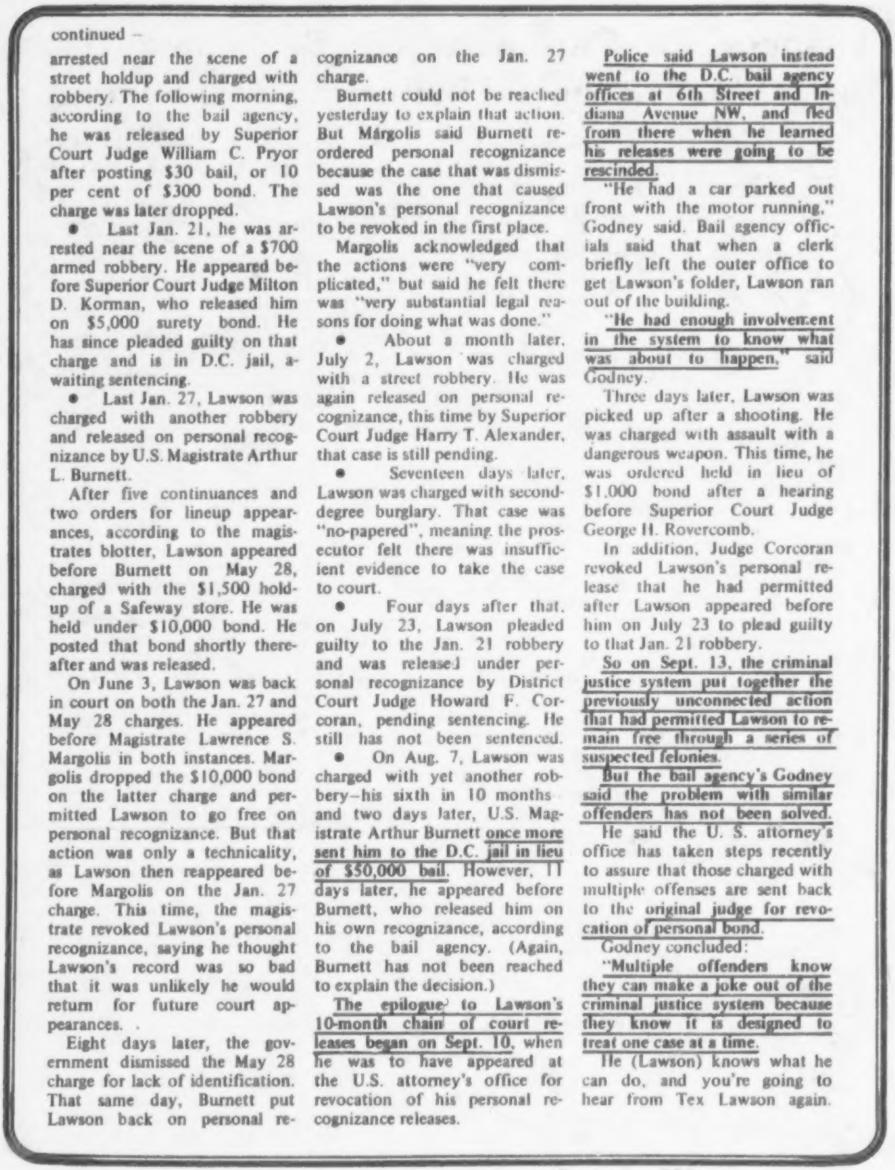

continued –

arrested near the scene of a street holdup and charged with robbery. The following morning, according to the bail agency, he was released by Superior Court Judge William C. Pryor after posting $30 bail, or 10 per cent of $300 bond. The charge was later dropped.

- Last Jan. 21, he was arrested near the scene of a $700 armed robbery. He appeared before Superior Court Judge Milton D. Korman, who released him on $5,000 surety bond. He has since pleaded guilty on that charge and is in D.C. jail, awaiting sentencing.

- Last Jan. 27, Lawson was charged with another robbery and released on personal recognizance by U.S. Magistrate Arthur L. Burnett.

After five continuances and two orders for lineup appearances, according to the magistrates blotter, Lawson appeared before Burnett on May 28, charged with the $1,500 holdup of a Safeway store. He was held under $10,000 bond. He posted that bond shortly thereafter and was released.

On June 3, Lawson was back in court on both the Jan. 27 and May 28 charges. He appeared before Magistrate Lawrence S. Margolis in both instances. Margolis dropped the $10,000 bond on the latter charge and permitted Lawson to go free on personal recognizance. But that action was only a technicality, as Lawson then reappeared before Margolis on the Jan. 27 charge. This time, the magistrate revoked Lawson's personal recognizance, saying he thought Lawson's record was so bad that it was unlikely he would return for future court appearances. .

Eight days later, the government dismissed the May 28 charge for lack of identification. That same day, Burnett put Lawson back on personal recognizance on the Jan. 27 charge.

Burnett could not be reached yesterday to explain that action. But Margolis said Burnett reordered personal recognizance because the case that was dismissed was the one that caused Lawson's personal recognizance to be revoked in the first place.

Margolis acknowledged that the actions were "very complicated," but said he felt there was "very substantial legal reasons for doing what was done."

- About a month later, July 2, Lawson was charged with a street robbery. He was again released on personal recognizance, this time by Superior Court Judge Harry T. Alexander, that case is still pending.

- Seventeen days later, Lawson was charged with second-degree burglary. That case was "no-papered", meaning the prosecutor felt there was insufficient evidence to take the case to court.

- Four days after that, on July 23, Lawson pleaded guilty to the Jan. 21 robbery and was released under personal recognizance by District Court Judge Howard F. Corcoran, pending sentencing. He still has not been sentenced.

- On Aug. 7, Lawson was charged with yet another robbery–his sixth in 10 months and two days later, U.S. Magistrate Arthur Burnett once more sent him to the D.C. jail in lieu of $50,000 bail. However, 11 days later, he appeared before Burnett, who released him on his own recognizance, according to the bail agency. (Again, Burnett has not been reached to explain the decision.)

The epilogue to Lawson's 10-month chain of court releases began on Sept. 10, when he was to have appeared at the U.S. attorney's office for revocation of his personal recognizance releases.

Police said Lawson instead went to the D.C. bail agency offices at 6th Street and Indiana Avenue NW, and fled from there when he learned his releases were going to be rescinded.

"He had a car parked out front with the motor running," Godney said. Bail agency officials said that when a clerk briefly left the outer office to get Lawson's folder, Lawson ran out of the building.

"He had enough involvement in the system to know what was about to happen," said Godney.

Three days later, Lawson was picked up after a shooting. He was charged with assault with a dangerous weapon. This time, he was ordered held in lieu of $1,000 bond after a hearing before Superior Court Judge George H. Revercomb.

In addition, Judge Corcoran revoked Lawson's personal release that he had permitted after Lawson appeared before him on July 23 to plead guilty to that Jan. 21 robbery.

So on Sept. 13, the criminal justice system put together the previously unconnected action that had permitted Lawson to remain free through a series of suspected felonies.

But the bail agency's Godney said the problem with similar offenders has not been solved.

He said the U. S. attorney's office has taken steps recently to assure that those charged with multiple offenses are sent back to the original judge for revocation of personal bond.

Godney concluded:

"Multiple offenders know they can make a joke out of the criminal justice system because they know it is designed to treat one case at a time.

He (Lawson) knows what he can do, and you're going to hear from Tex Lawson again.

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**REFERENCE IS MADE TO THE RELEASE OF PERSONS ON BOND IN THE FOLLOWING ARTICLE AND IT SHOULD BE NOTED THAT BOND REFERS TO RELEASE ON D. C. BAIL AGENCY, TAXPAYER SUPPORTED PROGRAM - Release on Recognizance, (ROR), PRE-TRIAL RELEASE AND SOME OTHER PROGRAMS, VERY FEW OF THESE WERE RELEASED ON SURETY BAIL BONDS OR AS SOME TIMES REFERRED TO "MONEY BAIL." Emphasis supplied -**

"REVOLVING DOOR" JUSTICE – WHY CRIMINALS GO FREE – U. S. News and World Report of May 10, 1976, contained the following excerpts in reference to arrests made by Washington D. C. law enforcement in cooperation with federal agents to apprehend local burglars and thieves - - -

> "Here, for example, is what was found out about the criminals stung by the Washington "Sting": Of the 152 so far arrested, 105 were discovered to be roaming free on parole or probation for a previous offense, or on some form of pretrial release, such as bail, on pending charges. And 114, or about 70 per cent, had prior criminal records." . . . .
>
> "Also disturbing was what happened to the entrapped thieves: At least 59 have been set free on bond or some other form of release pending disposition of their cases - - 19 of them with no cash bond required. One of those set free was a self-styled "hit man" - a killer for hire - - who gave police a resume of his "experience" in hopes of getting a job with the Mafia. He was released on $1000. bond." . . . .
>
> "Americans, for years, have been frightened by the constant rise in crime. Now, along with that fear, is a growing anger. The anger is about the way the nation's system of criminal justice handles criminals."
>
> "About one fourth of all persons arrested for felonies in Washington are either out on parole or probation for some previous crime, or else are free on some form of pretrial release on a pending charge - - -"
>
> Hans W. Mattick, director of the Center for Research in Criminal Justice in Chicago is quoted: "The criminal-justice system can be likened to a vacuum cleaner. The police are the mouth and the suction power. The courts are the hose. And the prisons are the bag. We've increased the size of the mouth and the suction power but not the other things."
>
> The U. S. News & World Report continues - -
>
> "It is this situation that contributes to the frustrations and anger of law-abiding citizens who find it difficult to understand why the criminal-justice system appears all too often to favor criminals over society at large."
>
> "Long-standing concern about Washington's bail policies has intensified in recent months because of several sensational cases. In one case an 86-year-old woman was hit on the head in a street robbery and died. Two of her alleged assailants were released without bond. A third, at the time of the attack, was free on bond on another robbery charge."
>
> "Not long before the robbery-killing, an Amtrak employee was stabbed to death on a bridge crossing Washington's Rock Creek Park. His alleged killer was released the next day without having to post any bond."

ARTICLE "D"

Fort Lauderdale News
Metro
Friday, May 8, 1981
Section B

## No-shows plague court system

# 43,000 turn blind eye to justice

*Jail guards scarce, page 2B.*

By Buddy Nevins
Staff Writer

More than 43,000 people charged with crimes and traffic offenses in the past fie years have failed to show in court — and the list grows by an average of 91 names every working day.

In most cases, nothing is done.

At least 2,700 are suspected of felonies, everything from robbery to attempted murder and large-scale drug smuggling.

Authorities blame the problem on Broward County's inadequate criminal justice system. There are not enough police to catch people who ignore orders to appear in court and not enough jail space to house them once caught.

"I have not had one day, one criminal docket, where I didn't have people fail to appear. Much of it is deliberate and willful disregard for the law," said an angry County Judge Patti Englander.

"It's on a daily basis. People just don't show up for many trials because, for the most part, nothing is done to them," said Chuck Morton, the assistant state attorney in charge of prosecuting County Court cases in Broward.

The no-show problem is most acute in County Court. Of the 43,658 outstanding warrants for no-shows, more than 40,000 are in County Court.

As of May 1, 24,864 people charged with traffic offenses since 1976 had failed to appear in County Court and had not been caught. Another 16,027 people charged with a misdemeanor, such as battery or prostitution, are still being sought.

"It is becoming a heavier and heavier load," said Capt. John Tamburello, a Broward Sheriff's Department administrator in charge of processing warrants for those who fail to appear.

Tamburello's staff has been adding an average of 91 names to the long list of no-shows every working day since Jan. 1, according to county statistics.

A warrant, legally known as a *capias*, is issued by a judge when a person fails to appear in court. It orders the sheriff to bring the suspect before the judge for trial.

But the Sheriff's Department cannot even serve most warrants, much less bring people to court.

"We don't have the manpower," said Sheriff Robert Butterworth.

There are five deputies assigned full time to serve warrants and arrest those who ignore court dates. These deputies hunt suspected felons almost exclusively, Butterworth said.

"The felony suspects get top priority. That's the cost-effective thing to do. For the rest, we depend on mailing a warrant," he said.

Besides, Butterworth said, there is no reason to bring in misdemeanor or traffic offenders. "There is no room in the jail for them."

Broward's jails are operating under a court order limiting the number of inmates. "Under the order, we have no room for anyone except felons," said Butterworth.

However, court officials and Butterworth warn that anyone who deliberately avoids court could end up in more serious legal trouble if they are ever caught.

FRANK, LOWE, AND FINGER, P.C.
ATTORNEYS AT LAW

THOMAS FRANK
WILLIAM S. FINGER
JO PITTMAN LOWE

29025D LAKESHORE CENTER
P. O. BOX 1477
EVERGREEN, CO 80439
(303) 674-6955

October 9, 1981

Mr. Randall Rader
108 Russell Senate Office Bldg.
Washington, DC 20510

Dear Mr. Rader:

Enclosed is a copy of my letter and related bail bond materials addressed to the abolition of commercial money bail bonds in S.1554 and S.1630. I sent the original and 12 copies for distribution to Mr. Nash. We would appreciate your including this in your subcommittee hearing record and distributing it to subcommittee members.

Thank you very much for your kind considerations.

Very truly yours,

Thomas Frank

Thomas Frank

TF:sl
Enclosure

FRANK, LOWE, AND FINGER, P.C.
ATTORNEYS AT LAW

THOMAS FRANK
WILLIAM S. FINGER
JO PITTMAN LOWE

29025D LAKESHORE CENTER
P. O. BOX 1477
EVERGREEN, CO 80439
(303) 674-6955

October 9, 1981

Subcommittee on Regulatory Reform
Judiciary Committee
United States Senate
102 Russell Senate Office Bldg.
Washington, DC 20510

Re: S.1554 and S.1630
Abolition of Money Bail Bonds

Dear Members of the Subcommittee:

I represent Continental Surety and Fidelity Insurance Company and Guarantee Management, Inc., two small insurers engaged in the business of underwriting commercial bail and immigration bonds. They are based in Colorado and South Carolina, respectively, although no bail is being underwritten in South Carolina currently. On their behalf, I submit the following comments and materials in support of retaining a judicial option to use third party compensated sureties in appropriate criminal cases.

Colorado, as did several states and the federal government with the Bail Reform Act of 1966, felt the need to reform its criminal defendant release and appearance laws. These perceived reform needs in the mid 1960's were focused upon attempts to set objective criteria to qualify arrested persons for release on personal recognizance. Later, in the early 1970's, organized efforts were taken to implement release of criminal defendants on a 10 percent bond payment by defendants into the registries of the courts. Colorado had then, and has now, criminal justice code provisions allowing a judge wide discretionary authority in setting the type and amount of bond for a defendant. Personal recognizance, property real and personal, and third party compensated surety (money bonds) are all permitted by C.R.S. 1973 16-4-104.

Two problems motivated Colorado bond reform attempts. The first was the tendency of the judicial system to "take the easy way out" by automatically setting money bonds often by rote schedule. Defendants seeking personal recognizance or other statutory appearance alternatives had to stay in jail until the court was in session and then had to initiate such alternatives at their advisement of rights.

Personal recognizance and 10 percent bail bond reform attempts therefor were aimed at setting up working systems based on objective criteria to automatically evalute arrestees for qualification for release on personal recognizance or upon the posting of 10 percent of set bond. These were ancillary systems sometimes organized within, and sometimes organized as independent projects, designed to supplement the routine operation of the criminal justice system.

The second problem arguing for bail reform attention was Colorado's previous statutory standard for setting appearance bonds. C.R.S. 1973 16-4-101 formerly provided that

> "All persons shall be bailable before conviction, except in a prosecution for a capital offense in which the proof is evident, or the presumption great."

and C.R.S. 16-4-103(2) made the primary condition on any bail bond only the likelihood of appearance of the defendant. No discretion was vested in the court to consider the probability that a defendant could commit crime while on release and no additional conditions other than appearance were allowed to be attached to the terms of the defendant's release. In 1979 the Colorado Legislature provided for the imposition of release conditions other than appearance and partially headed in the direction of the detention evaluation provisions of S.1554 and S.1630:

> C.R.S. 1973, 16-4-103. Fixing of bail and conditions of bail bond. (2) A condition of every bail bond, and the only condition for a breach of which a surety or security on the bail bond may be subjected to forfeiture, is that the released person appear to answer the charge against him at a place and upon a date certain and at any place or upon any date to which the proceeding is transferred or continued. Further conditions of every bail bond shall be that the released person not commit any felony while at liberty on such bail bond and that the court in which the action is pending have the power to revoke the release of the defendant, to increase the bail bond, or to change any bail bond condition if it is shown that a competent court has found probable cause to believe that the defendant has committed a class 1, 2, 3 or 4 felony while released

> pending adjudication of a prior felony charge. In addition, the judge may impose such additional conditions upon the conduct of the defendant as will, in the judge's opinion, render it more likely that the defendant will fulfill the other bail bond condi-tions. These additional conditions may include submission of the defendant to the supervision of some qualified person or organization. Any defendant whose bail bond is revoked or increased under an order entered pursuant to this section and who remains in custody must be tried on the charges on which the bail bond has been increased or revoked within ninety days after such order or within six months after his arraignment on such charges, whichever date is earlier.

With the 1979 amendments Colorado has enacted several of the release conditions authority proposed by S.1554's amendments to Section 3142 of the Criminal Code, save for Section 3142's authority for a judge to detain a defendant upon a finding that he is likely to commit crime if released pending trial. Colorado's law only authorizes revocation of release upon a finding of probable cause that a defendant has committed crime while on release.

The evolving pretrial release system in Colorado is typical of other states. Pretrial release by means other than money bond seems to work only in direct relation to the support given these programs and the resulting speed and efficiency with which an individual defendant can be objectively evaluated and processed. Without full-blown administrative support for immediately evaluating and determining the eligibility of a defendant for pre-trial release be it under an O.R. or 10 percent bond program, or under proposed S.1554, Sec. 3142(c) release on conditions criteria, an arrested person will face an initial period of incarceration considerably greater than exists under present practices if the money bond alternative is not also continued.

Additionally, the sheer volume of numbers of criminal defendants processed through the state court systems as compared to the federal criminal courts poses a threat to any pretrial release system focused on the evaluation of each individual person arrested by whatever standard. The large numbers of criminal defendants being processed through state court systems has forced judges and administrators to process "crimes charged" rather than individuals through the use of bail bond schedules. The consideration and evaluation of individual defendants has been beyond their administrative capacities. The abuses charged to the commercial bail bond system are thus in no small part due to the needs of criminal justice systems to implement some form of pretrial release system efficiency however it may be flawed.

The abolition of commercial bail bonds as one judicial alternative proposed through S.1554 and S.1630 is a high risk draconian effort to force the criminal justice system to fully adopt and implement an individual pretrial release evaluation program. Without concomitant dedication of funds and personnel to implement evaluation of each defendant according to the conditions set forth in S.1554's rewrite of Sec. 3142(b) and (c), the pretrial release results intended could well be subverted. We believe to a certainty that any individual defendant pretrial release evaluation system adopted at the state level with its higher volume of criminal cases cannot work without a great commitment of additional money and manpower to state criminal justice systems.

Although the commercial bail bond system is admittedly flawed, it does provide an efficient pretrial release alternative for many criminal defendants and court systems in the vast majority of criminal instances. It serves defendants in affording expeditious release from incarceration and it affords the criminal justice system considerable assurance that the defendant will appear to answer to the government's charge. Commercial bail bonds in combination with a simplified and streamlined personal recognizance qualification process allows a criminal justice system to focus its resources on evaluating those defendants charged with capital, violent or other crime for which money bond is no guarantee of appearance or pretrial release is inappropriate under any conditions.

We believe that the abuses within the commercial money bond system can be effectively regulated where they occur by vesting authority and discretion within the courts to adjust bail bond premiums charged on an individual case basis to avoid unjust enrichment and to regulate conditions and practices involving the surrender of a defendant by a surety. Colorado has taken steps to provide some authority and discretion in this area under the provisions of C.R.S. 1973 16-4-108. We have no ultimate solutions to offer on the conflicting problems involved in enacting an effective and fair pretrial release statute. We do believe that third party compensated sureties have a useful role and function in any such program. Involving, as they do, the private sector of the American economy with an independent incentive to evaluate individuals charged with crime and to secure their appearance in answer to such charges, they have a history and a track record of aiding the administration of criminal justice in this country. We suggest that their retention as only one of the several judicial options for the imposition of conditions for pretrial release under S.1554's rewrite of Sec. 3142(c) is both necessary and wise.

The administration of the criminal justice system can, through appropriate guidelines and policies, utilize money bond surety as much or as little as is necessary depending upon how effective the system is in implementing the individual defendant evaluations for personal recognizance and conditioned release contemplated by these bills. The appropriate provision for continuation of compensated surety bonds under the federal act will retain what has historically been an efficient aid to the administration of justice and an additional means by which a person charged with crime can secure expeditious release in appropriate circumstances. The retention of this option will not inhibit the development of alternative pretrial release standards and programs. And, while these programs evolve, retention of money bond will assure that the system does not break down. An evolution of pretrial release, not revolution, is the prudent course.

Respectfully submitted,

Thomas Frank

Thomas Frank
Counsel to Continental Surety and
Fidelity Insurance Company and
Guarantee Management, Inc.

## PART I

## RELEASE ON BAIL

**16-4-101. Bailable offenses.** All persons shall be bailable before convictio except in a prosecution for a capital offense in which the proof is evide or the presumption great. In any capital case, the defendant may make written motion for admission to bail upon the ground that the proof is no evident or that presumption is not great, and the court shall promptly conduc a hearing upon such motion. At such hearing, the burden shall be upon th people to establish that the proof is evident or that the presumption is grea The court may combine in a single hearing the questions as to whether th proof is evident or the presumption great with the determination of the exis ence of probable cause to believe that the defendant committed the crim charged.

**16-4-102. Right to bail - before conviction.** Any person who is in custody and for whom no bail has been set pursuant to the applicable rule of criminal procedure may advise any judge of a court of record in the county where he is being held of that fact with a request that bail be set. Upon receiving the request, the judge shall cause the district attorney to be notified immediately of the arrested person's request, and said district attorney shall have the right to attend and advise the court of matters pertinent to the amount of bail to be set. The judge shall also order the appropriate law enforcement agency having custody of the prisoner to bring him before the court forthwith, and the judge shall set bail if the offense for which the person was arrested is bailable. It shall not be a prerequisite to bail that a criminal charge of any kind has been filed.

**16-4-103. Fixing of bail and conditions of bond.** (1) At the first appearance of a person in custody before a judge of a court of record, the amount of bail and type of bond shall be fixed by the judge, unless an indictment, information, or complaint has theretofore been filed and the amount of bail and type of bond has been fixed upon the return of the indictment, or filing of the information or complaint, in which event the propriety of the bond shall be subject to reappraisal. The amount of bail and type of bond shall be sufficient to assure compliance with the conditions set forth in the bail bond.

**16-4-103. Fixing of bail and conditions of bail bond.** (2) A condition every bail bond, and the only condition for a breach of which a surety security on the bail bond may be subjected to forfeiture, is that the releas person appear to answer the charge against him at a place and upon a da certain and at any place or upon any date to which the proceeding is transferred or continued. Further conditions of every bail bond shall be that released person not commit any felony while at liberty on such bail bo and that the court in which the action is pending have the power to revo the release of the defendant, to increase the bail bond, or to change bail bond condition if it is shown that a competent court has found probab cause to believe that the defendant has committed a class 1, 2, 3, or 4 felo while released pending adjudication of a prior felony charge. In addition judge may impose such additional conditions upon the conduct of the defendant as will, in the judge's opinion, render it more likely that the defendant will fulfill the other bail bond conditions. These additional conditions may include submission of the defendant to the supervision of some qualified person or organization. Any defendant whose bail bond is revoked or increased under an order entered pursuant to this section and who remains in custody must be tried on the charges on which the bail bond has been increased or revoked within ninety days after such order or within six months after his arraignment on such charges, whichever date is earlier:

**16-4-104. Bail bond - alternatives.** (1) When the amount of bail is fixed by the judge of a court of record, he shall also determine which of the following kinds of bond shall be required for the pretrial release of the defendant:

(a) The defendant may be released from custody upon execution by him of a personal recognizance. The court may require additional obligors on the bond as a condition of granting the same.

(b) The defendant may be released from custody upon execution of bond in the full amount of the bail to be secured in any one or more, or any combination of, the following ways:

(I) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds of a kind in which trustees are authorized to invest trust funds under the laws of this state; or

(II) By real estate situated in this state with unencumbered equity not exempt from execution owned by the accused or any other person acting as surety on the bond; or

(III) By sureties worth at least one and one-half the amount of bail set in the bond, or by corporate surety company authorized to do business in this state.

(2) If the bond is secured by stocks or bonds, the accused or sureties shall deposit the stock and bond certificates with the clerk of the court and also file with the bond a sworn schedule which shall be approved by the clerk of the court and shall contain the following:

(a) A list of the stocks and bonds deposited describing each in sufficient detail that it may be identified; and

(b) The market value of each stock and bond; and

(c) The total market value of the stocks and bonds listed; and

(d) A statement that the affiant is the owner of the stocks and bonds listed, and they are not exempt from execution; and

(e) A statement that such stocks and bonds are security for compliance by the accused with the primary condition of the bond; and

(f) A signed blank stock power for each stock certificate or registered bond deposited.

(3) If the bond is secured by real estate, the accused or sureties shall file with the bond a sworn schedule which shall constitute a material part of the bond. Any false statement in the schedule may be punished as a contempt of court in addition to any other criminal sanctions. The schedule shall contain the following:

(a) A legal description of the real estate; and

(b) A description of any and all encumbrances on the real estate, including the amount of each and the holder thereof; and

(c) The market value of his interest in the unencumbered equity of property owned by the affiant either alone or jointly; and

(d) A statement that the affiant is the owner of such interest in the unencumbered equity and that it is not exempt from execution or, if exempt, waiving the exemption; and

(e) A statement that the real estate is security for the compliance by the accused with the primary condition of the bond.

**16-4-105. Selection by judge of the amount of bail and type of bond - criteria.** (1) In determining the amount of bail and the type of bond to be furnished by the defendant, the judge fixing the same shall consider and be governed by the following criteria insofar as these factors are relevant to the risk of nonappearance:

(a) The amount of bail shall not be oppressive;

(b) When a person is charged with an offense punishable by fine only, the amount of bail shall not exceed the amount of the maximum penalty;

(c) The defendant's employment status and history and his financial condition;

(d) The nature and extent of his family relationships;

(e) His past and present residences;

(f) His character and reputation;

(g) Identity of persons who agree to assist him in attending court at the proper time;

(h) The nature of the offense presently charged and the apparent probability of conviction and the likely sentence;

(i) The defendant's prior criminal record, if any, and, if he previously has been released pending trial whether he appeared as required;

(j) Any facts indicating the possibility of violations of law if the defendant is released without restrictions;

(k) Any facts indicating a likelihood that there will be an intimidation or harassment of possible witnesses by the defendant;

(l) Any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction;

(m) Unless the district attorney consents, no person shall be released on personal recognizance if he is presently at liberty on another bond of any kind in another criminal action involving a felony or a class 1 misdemeanor;

(n) Unless the district attorney consents, no person shall be released on personal recognizance if he has a record of conviction of a class 1 misdemeanor within two years, or a felony within five years, prior to the release hearing;

(o) No person shall be released on personal recognizance until and unless the judge ordering the release has before him reliable information concerning the accused, prepared or verified by a person designated by the court, or substantiated by sworn testimony at a hearing before the judge, from which an intelligent decision based on the criteria set forth in this section can be made. Such information shall be submitted either orally or in writing without unnecessary delay.

(2) If a defendant has been required by the judge to furnish a secured bond and he is unable within two days to furnish security, if he believes that upon the presentation of evidence not heard or considered by the judge, he would be entitled to release on personal recognizance, such defendant may file a written motion for reconsideration in which he shall set forth the matters not theretofore considered by the judge who entered the order for bond in the first instance. The judge may summarily deny the motion or promptly conduct a hearing thereon.

**16-4-106. When original bond continued.** Once a bond has been executed and the person released from custody thereon, whether a charge is then pending or is thereafter filed or transferred to a court of competent jurisdiction, the original bond shall continue in effect until final disposition of the case in the trial court. If a charge filed in the county court is dismissed and the district attorney states on the record that the charge will be refiled in the district court, the county court before entering the dismissal shall fix a return date upon which the defendant must appear in the district court and continue the bond. Any bond continued pursuant to this section is subject to the provisions of section 16-4-107.

**16-4-107. Reduction or increase of bail - change in type of bond.** (1) Upon application by the district attorney or the defendant, the court before which the proceeding is pending may increase or decrease the amount of bail, may require additional security for a bond, or may dispense with security theretofore provided, or may alter any condition of the bond.

(2) Reasonable notice of an application for modification of a bond by the defendant shall be given to the district attorney.

(3) Reasonable notice of application for modification of bond by the district attorney shall be given to the defendant, except as provided in subsection (4) of this section.

(4) Upon verified application by the district attorney stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bond, the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing, the court may enter an order authorized by subsection (1) of this section.

(5) The district attorney has the right to appear at all hearings seeking modification of the terms and conditions of bail and may advise the court on all pertinent matters during the hearing.

**16-4-108. Exoneration from bond liability.** (1) Any person executing a bail bond as principal or as surety shall be exonerated as follows:

(a) When the condition of the bond has been satisfied; or

(b) When the amount of the forfeiture has been paid; or

(c) Upon surrender of the defendant into custody at any time before a judgment has been entered against the sureties for forfeiture of the bond, upon payment of all costs occasioned thereby. A surety may seize and surrender the defendant to the sheriff of the county wherein the bond is taken, and it is the duty of the sheriff, on such surrender and delivery to him of a certified copy of the bond by which the surety is bound, to take the person into custody and, by writing, acknowledge the surrender. If a compensated surety is exonerated by surrendering a defendant prior to the appearance date fixed in the bond, the court, after a hearing, may require the surety to refund part or all of the bond premium paid by the defendant if necessary to prevent unjust enrichment.

(2) Upon entry of an order for deferred prosecution as authorized in section 16-7-401, sureties upon any bond given for the appearance of the defendant shall be released from liability on such bond.

**16-4-109. Disposition of security deposits upon forfeiture or termination of bond.** (1) If a defendant is released upon deposit of cash in any amount or upon deposit of any stocks or bonds and the defendant is later discharged from all liability under the terms of the bond, the clerk of the court shall return the deposit to the person who made the deposit.

(2) Where the defendant has been released upon deposit of cash, stocks, or bonds or upon a surety bond secured by property, if the defendant fails to appear in accordance with the primary condition of the bond, the court shall declare a forfeiture. Notice of the order of forfeiture shall be mailed forthwith by the court to the defendant and sureties, if any, at their last known address. If the defendant does not appear and surrender to the court having jurisdiction within thirty days from the date of the forfeiture or within that period satisfy the court that appearance and surrender by the defendant is impossible and without his fault, the court shall enter judgment for the state against the defendant for the amount of the bail and costs of the court proceedings. Any cash deposits made with the clerk of the court shall be applied to the payment of costs. If any amount of such cash deposit remains after the payment of costs, it shall be applied to payment of the judgment.

(3) The court may order that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice so requires.

**16-4-110. Enforcement when forfeiture not set aside.** By entering into a bond, each obligor, whether he is the principal or a surety, submits to the jurisdiction of the court. His liability under the bond may be enforced, without the necessity of an independent action, as follows: The court shall order the issuance of a citation directed to the obligor to show cause, if any there be, why judgment should not be entered against him forthwith and execution issue thereon. Said citation may be served personally or by certified mail upon the obligor directed to the address given in the bond. Hearing on the citation shall be held not less than twenty days after service. The defendant's attorney and the prosecuting attorney shall be given notice of the hearing. At the conclusion of the hearing, the court may enter a judgment for the state and against the obligor, and execution shall issue thereon as on other judgments. The district attorney shall have execution issued forthwith upon the judgment and deliver it to the sheriff to be executed by levy upon the stocks, bond, or real estate which has been accepted as security for the bond.

**16-4-111. Type of bond in certain misdemeanor cases.** (1) In exercising the discretion mentioned in section 16-4-104, the judge shall release the accused person upon personal recognizance if the charge is a class 3 misdemeanor or a petty offense, or any unclassified offense for a violation of which the maximum penalty does not exceed six months' imprisonment, and he shall not be required to supply a surety bond, or give security of any kind for his appearance for trial other than his personal recognizance, unless one or more of the following facts are found to be present:

(a) The arrested person fails to sufficiently identify himself; or

(b) The arrested person refuses to sign a personal recognizance; or

(c) The continued detention or posting of a surety bond is necessary to prevent imminent bodily harm to the accused or to another; or

(d) The arrested person has no ties to the jurisdiction of the court reasonably sufficient to assure his appearance, and there is substantial likelihood that he will fail to appear for trial if released upon his personal recognizance; or

(e) The arrested person has previously failed to appear for trial for an offense concerning which he had given his written promise to appear; or

(f) There is outstanding a warrant for his arrest on any other charge or there are pending proceedings against him for suspension or revocation of parole or probation.

## PART 2

## BAIL AFTER CONVICTION

**16-4-201. Bail after conviction.** After conviction, either before or after sentencing, the defendant may orally, or in writing, move for release on bail pending determination of a motion for a new trial or motion in arrest of judgment or during any stay of execution or pending review by an appellate court and, except in cases where the defendant has been convicted of a capital offense, the trial court, in its discretion, may continue the bond given for pretrial release, or may release the defendant on increased bail, or require bond under one or more of the alternatives set forth in section 16-4-104. The district attorney must be present at the time the court passes on a defendant's motion for release on bail after conviction. No bond shall be continued in effect following conviction unless the written consents of the sureties, if any, are filed of record.

**16-4-202. Appeal bond hearing - factors to be considered.** (1) The court shall consider the following factors in deciding whether or not an appeal bond should be granted and determining the amount of bail and the type of bond to be required:

(a) The nature and circumstances of the offense before the court and the sentence imposed for that offense;

(b) The defendant's length of residence in the community;

(c) The defendant's employment, family ties, character, reputation, and mental condition;

(d) The defendant's past criminal record and record of appearance at court proceedings;

(e) Any showing of intimidation or harassment of witnesses or potential witnesses, or likelihood that the defendant will harm or threaten any person having a part in the trial resulting in conviction;

(f) Any other criminal charges pending against the defendant, and the potential sentences should defendant be convicted of those charges;

(g) The circumstances of, and sentences imposed in, any criminal case in which the defendant has been convicted but execution stayed pending appeal; or

(h) The likelihood that the defendant will commit additional criminal offenses during the pendency of his appeal.

**16-4-203. Appeal bond hearing - order.** (1) After considering the factors set forth in section 16-4-202, the court may enter one of the following orders:

(a) Deny the defendant appeal bond if the court finds that a significant probability exists that the defendant will engage in criminal conduct during the pendency of the appeal;

(b) Deny the defendant appeal bond if the court finds that none of the terms and conditions set forth in subsections (2) and (3) of this section would sufficiently assure appearance of the defendant as required during the pendency of the appeal or at its conclusion;

(c) Grant the defendant appeal bond.

(2) If the court determines that an appeal bond should be granted, the court shall set the amount of bail and order either:

(a) An appeal bond in the amount of the bail to be executed and secured by depositing cash or property as provided by statute or by an approved surety or sureties; or

(b) An appeal bond in the amount of the bail to be executed on the personal recognizance of the defendant.

(3) In addition to the above, the court may:

(a) Place the defendant in the custody of the probation department or a designated person who agrees to supervise him;

(b) Place restrictions on the travel, activities, associations, or place of abode of the defendant during the pendency of the appeal;

(c) Impose any other condition deemed necessary to assure defendant's appearance as required.

(4) Upon written motion of the state or the defendant, the sentencing court may increase or reduce the amount of appeal bond, alter the security for or conditions of the appeal bond, or revoke the appeal bond. Notice of hearing on the motion shall be given in the manner provided in section 16-4-107.

(5) If the defendant has been charged with committing another felony or class 1 misdemeanor while he is at liberty on an appeal bond, and probable cause has been found with respect to such other felony or class 1 misdemeanor or the defendant has waived his right to a probable cause determination as to the felony or class 1 misdemeanor, the court shall revoke his appeal bond on motion of the attorney general or district attorney.

**16-4-204. Appellate review of terms and conditions of bail or appeal bond.** (1) After entry of an order pursuant to section 16-4-107 or 16-4-201, the defendant or the state may seek review of said order by filing a petition for review in the appellate court. If an order has been entered pursuant to section 16-4-104, 16-4-107, or 16-4-201, the petition shall be the exclusive method of appellate review.

(2) The petition shall be in writing, shall be served as provided by court rule for service of motions, and shall have appended thereto a transcript of the hearing held pursuant to section 16-4-107 or 16-4-203. The opposing party may file a response thereto within five days or as provided by court rule.

(3) After review, the appellate court may:

(a) Remand the petition for further hearing if it determines that the record does not disclose the findings upon which the court entered the order; or

(b) Order the trial court to modify the terms and conditions of bail or appeal bond; or

(c) Order the trial court to modify the terms and conditions of bail or appeal bond and remand for further hearing on additional conditions of bail or appeal bond; or

(d) Dismiss the petition.

(4) Nothing contained in this section shall be construed to deny any party the rights secured by section 21 of article II of the Colorado constitution.

**16-4-205. When appellate court may fix appeal bond.** If a trial court fails or refuses to grant or deny an appeal bond within forty-eight hours following application for such bond, the defendant may move the appellate court for such an order, and that court shall promptly hear and rule upon the motion.

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# THE ILLINOIS BAIL SYSTEM: A SECOND LOOK

*By* TYCE S. SMITH[*]
*and* JAMES W. REILLEY[**]

On January 1, 1964, a new bail system was instituted in Illinois. The initial result of this system was the elimination of the traditional bail bondsman and the substitution of a unique bail system in its stead.[1] Primarily, the new system provides for: first, the substitution of penalties of a penal rather than monetary nature to insure the appearance of a defendant by making bail jumping under any type of bond a separate criminal offense;[2] secondly, the liberal use of release on personal recognizance or release on the signature of the defendant;[3] and, finally, allowance of a defendant to be released from custody upon the "deposit with the clerk of the court . . . [of] a sum of money equal to 10% of the bail which had been set by the court and the clerk of the court . . . and retention of 10% of the amount so deposited as a bail bond cost."[4]

The position of the United States Supreme Court on admission to bail was stated by Justice Jackson in *Stack v. Boyle*, when he wrote:

> The practice of admission to bail, as it has evolved in Anglo-

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[*] B.S., Kansas University; J.D., Washburn University Law School (Topeka, Kansas); presently doing graduate work towards an M.B.A. at DePaul University and attending the Lawyers Institute at The John Marshall Law School, where he serves as mentor.

[**] B.S., Loyola University; J.D. with honor, The John Marshall Law School, 1969. Mr. Reilley is an instructor at John Marshall in the Argument course. Formerly Assistant State's Attorney of Cook County, Illinois. Partner with Tyce S. Smith in the firm of Smith & Reilley in Chicago, specializing in criminal defense.

[1] Boyle, *Bail Under the Judicial Article*, 17 DEPAUL L. REV. 267 (1968).

[2] ILL. REV. STAT. ch. 38, §32-10 (1971):

> Violation of Bail Bond
> Whoever, having been admitted to bail for appearance before any court of record of this State, incurs a forfeiture of the bail and wilfully fails to surrender himself within 30 days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned in the penitentiary not more than five years, or both; or if the bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned in a penal institution other than the penitentiary, not more than one year or both.

*See* Kamin, *Bail Administration in Illinois*, 53 Ill. B.J. 674 (1965).

[3] *Id.* §110-2.

> When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance.

[4] *Id.* §110-7(a), (f).

> American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.[5]

Recent efforts of reform,[6] although severely criticized, have instituted a form of preventive detention abhorrent to Anglo-American jurisprudence.[7] A viable alternative must soon be found before such a system is instituted on a widescale basis.

It has been some years since any type of empirical study has been done of the Illinois bonding system. With the cooperation of the clerk of the court, the following statistics were compiled over a period of six months, forming the foundation of this article.[8] While acknowledging the brave advance of the new bail system, the results of this study are submitted with the belief that both modifications and reforms are presently needed.

## PRELIMINARY STUDIES

### *Chicago Study*

The Illinois bail system is founded on three fundamental premises. First, factual studies prove that the great majority of persons released on bail have no intention of violating bail and will appear for trial. Second, to the extent that pecuniary loss is a deterrent, such financial loss should be minimized in the case of the person who appears for trial. Finally, a person who will jump bail is not deterred by the prospect of pecuniary loss to himself or anyone else and other deterrents are therefore required.[9]

The factual studies supporting these premises were conducted primarily in the early 1960's, but as early as 1927, the then existing Chicago bail bond system was being severely criticized in the classic Chicago Study of Arthur Beeley.[10] This study examined the background of 90% of the unsentenced jail population, establishing that 70% had families and reputable persons in the community to speak for them, and only 50% had any prior criminal convictions. Yet, release on personal recognizance occurred in only 50% of the cases, and those were only for minor offenses.

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[5] 342 U.S. 1, 7-8 (1951).

[6] District of Columbia Court of Reform and Criminal Procedure Act. Pub. L. 91-358, 84 STAT. 473 et seq. (1970); Title II, §210, ch. 13, sub. ch. III §23-1321-32.

[7] Miller, *Preventive Detention — A Guide to the Eradication of Individual Rights*, 15 HOW. L.J. 1 (Fall 1970); Hruska, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHT. L. REV. 36 (Fall 1969); Allington, *Preventive Detention of the Accused Before Trial*, 19 KAN. L. REV. 69 (Fall 1970).

[8] A sample technique was utilized only when a totality of figures for Cook County or Chicago could not be obtained. When a sample was required, a random technique was used based on a sample population where possible.

[9] Committee's comment, ILL. ANN. STAT. ch. 38, §110 (Smith-Hurd Supp. 1970).

[10] BEELEY, THE BAIL SYSTEM IN CHICAGO (1927).

The most significant finding, however, was that 28% were needlessly detained, while undependable bail risks were allowed to be free on bail. In light of Beeley's conclusion that hardened criminals were allowed freedom while better bail risks were not, he recommended the following: (1) widescale use of the summons to replace the prevailing arrest procedure (75% of all criminal cases were initiated by arrests); (2) a constitutional amendment to allow selective preventive detention; (3) background investigatory procedures so that bail setting could be an individual determination rather than being geared to an arbitrary bond schedule as it was in 1927.[11] These findings formed the working hypothesis of each of the subsequent studies.

### *The Manhattan Project*

### (Vera Project)

This project, which was the foundation for all subsequent studies, was initiated by a wealthy chemical industrialist, Louis Schweitzer, upon discovery of the shocking jail abuses which existed in New York City. Mr. Schweitzer founded and funded the Vera Foundation, which conducted an experiment based on the premise that certain persons with strong community ties could safely be released on their own recognizance, and that if an investigatory procedure verified this background and supplied this information to the courts, the individual could be released without financial security. The initial procedures of the study were effectuated by New York University Law students who interviewed "indigent defendants."[12] To eliminate from the sample technique other exogenous variables which might introduce error and seriously impair the reliability of the study, there was a selective exclusion of certain offenses from the study including sex, narcotics, and homicide.[13]

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[11] A summary of Beeley's pioneer study appears in Freed and Ward, BAIL IN THE UNITED STATES: 1964, prepared as a working paper for the National Conference on Bail and Criminal Justice held on May 27-29, 1964, at Washington D.C., under the co-sponsorship of the United States Department of Justice and the Vera Foundation, Inc. Beeley's treatise is also discussed in *Attorney General Commission*, REPORT ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (Feb. 25, 1963).

[12] "Indigent" was defined as not being represented by an attorney at arraignment.

[13] Ralls, *Bail in the United States*, 48 MICH. S.B.J. 28 (Jan. 1969).

Four factors were selected as determinative of the risk inherent in releasing an individual on his own recognizance: (1) residential stability; (2) employment history; (3) family contacts in city; and (4) prior criminal record. Each individual interviewed was assigned a certain number of points per designated criterion, and if the point total was sufficient, he was recommended for release on individual recognizance. Preliminary figures indicated a favorable comparison with forfeiture rates on bail bonds. The first reports showed that among the 3,505 defendants released under the project, only 50 or 1.4% failed to appear, while this compared to a 3% forfeiture rate on bail bonds.[14] Later reports were not as favorable; the program expanded, and the forfeiture rate for those released on bail bonds was 4.4%; for those released on recognizance, 15.4%; and for those posting cash bail, 19.4%.[15]

The Vera study had the benefit of an earlier study, the findings of which differed only slightly.[16] The earlier study indicated that a defendant freed on bond had a substantially better chance to be acquitted than a jailed defendant. Thus, both studies reached the conclusion that the failure to grant the release on bond has a substantial and unreasonable effect upon the determination of a case.

In Des Moines, Iowa, a study parallel to the Vera Foundation Study in New York was sponsored by the Hawley Welfare Foundation. The Hawley Project excluded cases of murder, forcible rapes, narcotics, and sex crimes. At the end of the first year of operation, of the 750 released under the program, only 12 were bond forfeitures, or a rate of only 1.5%.[17] Many similar experiments were conducted in other cities.[18] The two most significant of these were the District of Columbia and Los Angeles studies. The only real difference between these projects, however, was the presence of a salaried investigator in the Los Angeles project.[19]

### *The San Francisco Bail Project*

Instituted by the San Francisco Bar Association and augmented by VISTA volunteers in 1964, this project studied the bail setting procedure in San Francisco. The project was modeled after the Vera study; however, the standards for release were more liberal since capital crimes were excluded. Approximately 70% of those released were charged with a felony. An important procedure, followed to a lesser extent in the Vera project, was an intensive "follow-up" in which the defendants were notified of court appearances and assisted in obtaining counsel.

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[14] Ares, Rankin, and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 67 (1963).

[15] Schaeffer, *Report on Bail & Parole Jumping in Manhattan*, Vera Institute of Justice (1970).

[16] Roberts and Palerno, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958).

[17] *Workshop: Establishing Bail Projects*, 1965 U. Ill. L.F. 42, 45.

[18] Note 8 *supra*.

[19] Los Angeles Superior Court, Release of Defendants without Bail: Preliminary Pilot Study Report (Sept. 1964).

The following statistics indicate the number of persons accused of a crime who had been released on their own recognizance through the project from August 1 to July 31.

*Table 1*[20]

| | |
|---|---|
| 1964-1965 | 415 |
| 1965-1966 | 1,326 |
| 1966-1967 | 2,374 |
| 1967-1968 | 2,262 |
| | 6,377 |

Perhaps due to the more liberal release standards, the 10% forfeiture rate was quite high.

Other bail projects in which VISTA participated took place in Philadelphia, Miami, Tulsa and Baltimore. As a result of these projects, although more than 6,000 defendants were released, only an average of 3% failed to appear for trial.[21]

### *Kalamazoo County Study*

A more recent study took place in Kalamazoo County, Michigan, differing from the other studies in that it took place in a small midwestern county and the release criteria were more stringent, since all crimes of violence were excluded from the sample technique.[22] Significantly, the results of the study were similar to those in more urban areas, in that of the 395 persons released on their own recognizance between October 31, 1966 and December 31, 1968, only three willfully failed to appear. Also, a definite correlation between pre-trial detention and eventual conviction or jail sentence was found.

### *Cook County Bail Project*

The Cook County Bail Project[23] was a study, done basically by lay persons, of both the felony and misdemeanor versions of "Holiday Court."[24] The study was undertaken to determine the effect of the following section of the Illinois Bail Reform Act:

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[20] Levin, *The San Francisco Bail Project*, 55 A.B.A.J. 135 (1969).

[21] Kennedy, *VISTA Volunteers Bring About Successful Bail Reform Project in Baltimore*, 54 A.B.A.J. 1093 (1968).

[22] Hawthorne and McCully, *Release on Recognizance in Kalamazoo County*, 49 MICH. S.B.J. 23 (July 1970).

[23] Mosely, *Analysis of Cook County Bail Bond Project*, a study by the Alliance to End Repression (1970).

> When from all of the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance . . . . This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.[25]

The purpose of the study was to record four main observations: (1) the time given to the consideration of each case, (2) the frequency of representation by counsel, (3) the frequency of release of the accused on his own recognizance, or as it is termed, on Individual or "I" bond, and (4) the extent of questioning by the court concerning the accused's financial ability to meet the bond levied. The statistics demonstrated that: (1) the average bail hearing lasted less than one minute, (2) bonds were set for hundreds of people each weekend without legal representation,[26] (3) too few persons were released on their own recognizance, and, finally (4) in the great majority of cases no inquiry was made concerning the financial ability of the accused to make bail. Moreover, the most disturbing statistics showed that only 45 out of 1,171, or 3.8% of the bonds set were "I" bonds.

These statistical studies vividly illustrate the substantial difference that can exist between the results obtained in a tightly controlled experimental environment and in actual everyday operation. Illinois did not adopt the background investigatory and back-up procedures followed by the various studies and, consequently, the Cook County Bail Project demonstrated the deplorable results.

## BAIL OPERATIONS IN COOK COUNTY

Cook County is divided into six judicial districts composed of Chicago, which constitutes District I, and five outlying suburban areas. There are three types of bonds set in the Illinois court system: (1) the "I" bond or the individual recognizance bond; (2) the "D" bond in which the accused posts 10% of the judicially set bond in cash and 10% of this amount is retained by the county to meet administrative expenses;[27] and

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[24] A "Holiday Court" is one that regularly convenes at the criminal court building on weekends and holidays for purposes of setting bail for defendants arrested the night before.

[25] ILL. REV. STAT. ch. 38, §110-2 (1971).

[26] As a result of this study, the Public Defender's Office of Cook County now assigns duty attorneys for Holiday Court.

[27] The constitutionality of this procedure was recently upheld by the

(3) the "C" bond, which is of a pre-set amount for a minor offense and involves no judicial discretion. The "C" bond is difficult to evaluate because of the entering of an *ex parte* judgment when the defendant fails to appear. The judgment is in the nature of a finding of guilty with the punishment being a court order that the bond be taken as a fine. For the purposes of this article, thus, only the "I" and "D" bonds are evaluated.

The following table demonstrates the positive effect of the Cook County Bail Project.

*Table 2*[28]

| | Quantity | | | Percentage | |
|---|---|---|---|---|---|
| Year | D Bonds | I Bonds | Total D & I | D's to Total | I's to Total |
| 1969 | 111,157 | 13,361 | 124,518 | 89.60 | 10.40 |
| 1970 | 120,939 | 14,752 | 135,691 | 89.13 | 10.87 |
| 1971 | 130,472 | 21,815 | 152,287 | 82.95 | 17.05 |
| | Bonds Posted Municipal District I — Chicago | | | | |
| 1969 | 84,202 | 9,777 | 93,979 | 89.60 | 10.40 |
| 1970 | 90,938 | 10,553 | 101,491 | 89.60 | 10.40 |
| 1971 | 99,112 | 21,215 | 120,327 | 82.36 | 17.64 |

*The "I" Bond*

Release on individual recognizance, or "I" bond, is permitted in cases that fall within the purview of the first fundamental premise of the Ilinois bond system, that " . . . persons released on bail have no intention of violating bail and will appear for trial."[29] Moreover, the significant difference between the number of "I" bonds set by courts between 1970 and 1971 must in great part be attributed to the Cook County Bail Project. When compared with the first three years of operation of the Illinois bail system, these figures accurately demonstrate the weakness of the system.

*Table 3*[30]

*Bonds Posted — Cook County*

| Year | D Bonds | I Bonds | Total D & I | D's to Total | I's to Total |
|---|---|---|---|---|---|
| 1964 | 27,956 | 6,465 | 34,421 | 81.22 | 18.78 |
| 1965 | 46,418 | 10,002 | 56,420 | 82.27 | 17.73 |
| 1966 | 68,355 | 11,237 | 79,592 | 85.88 | 14.12 |

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United States Supreme Court in the case of Schilb v. Kuebel, 404 U.S. 357 (1971).

[28] Administrative report from the office of the Clerk of the Court of Cook County to Judge Peter Bakakos, Chief Judge of Surety Division.

[29] Note 9 *supra* at 299.

[30] Note 1 *supra* at 272.

Although a novelty, judges and magistrates were cognizant of both the statutory provisions governing the new procedure and its legislative intent. However, as time passed the use of release on individual recognizance rapidly diminished, clearly reflecting both increased case loads and judicial apathy. The large percentage of bond forfeitures occurring among those defendants who were the beneficiaries of the "I" bond release resulted in the judiciary rapidly becoming wary of this particular pre-trial method.

A comparison of the early and later years of operation shows a disturbing trend.

*Table 4*[31]

*I Bond Forfeitures — Municipal District No. 1, Chicago*

| Year | Bond Quantity | Quantity of Forfeitures | Percentage of Forfeitures |
|---|---|---|---|
| 1964 | 6,465 | 446 | 7 |
| 1965 | 10,002 | 1,562 | 15 |
| 1966 | 11,237 | 2,324 | 20.5 |

*I Bond Forfeitures — Cook County*[32]

| Year | Bond Quantity | Quantity of Forfeitures | Percentage of Forfeitures |
|---|---|---|---|
| 1969 | 9,777 | 2,134 | 21.80 |
| 1970 | 10,553 | 2,260 | 31.41 |
| 1971 | 21,215 | 4,789 | 22.57 |

It is obvious that in Cook County the majority of all bonds were posted in Chicago. The results of a free operation of the system have been discouraging when compared with the other studies.

### *The "D" Bond*

Clearly, many weaknesses did and still exist in the present system of setting "I" bonds. However, the "D" or 10% bond, based on the second fundamental premise that financial loss should be minimized for an accused, presents an entirely different situation. There is no apparent reason for the figure of 10%, except that this was the normal amount charged by the professional bail bondsman as a premium to meet an accused's bond. The Federal Bail Reform Act of 1966 was obviously modeled after the Illinois Act of 1964 and provides for the 10% deposit and individual release; however, this plan allows for the placement of a corporate surety.[33]

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[31] *Id.*

[32] Note 22 *supra.*

[33] 18 U.S.C. §3146.

An examination of the forfeiture record for "D" bonds shows that the rate has remained fairly constant over the years.

*Table 5*[34]

*"D" Bond Forfeitures — Municipal District No. 1*

| Year | Quantity of D Bonds | Quantity of Forfeitures | Percentage of Forfeitures |
|---|---|---|---|
| 1964 | 27,956 | 6,465 | 7.5 |
| 1965 | 46,418 | 10,002 | 10.5 |
| 1966 | 68,355 | 11,237 | 11 |
| 1969 | 84,202 | 11,402 | 13.54 |
| 1970 | 90,938 | 12,086 | 11.09 |
| 1971 | 99,112 | 13,172 | 13.29 |

*Rate as Held Over the County as a Whole*

| Year | Quantity of D Bonds | Quantity of Forfeitures | Percentage of Forfeitures |
|---|---|---|---|
| 1969 | 111,157 | 14,316 | 12.88 |
| 1970 | 120,939 | 15,098 | 12.48 |
| 1971 | 130,472 | 16,421 | 12.59 |

One apparent explanation for the rate difference between "D" and "I" Bond forfeitures is that the Illinois bonding system allows the bond monies to be refunded to the defendant's attorney, by court order, after the defendant has consented to such procedure in open court. Consequently, this refund right provides incentive for an attorney to move to vacate a bond forfeiture in order to protect his fee. Moreover, in Illinois there is a 30-day grace period before judgment is taken.[35] The differential created by this process can be observed by noting the following statistics of Municipal District No. 1:

*Table 6*[36]

| | Quantity Forfeitures | | Percentage Forfeitures to Received | | Percentage Judgments To Forfeitures | |
|---|---|---|---|---|---|---|
| Year | I Bonds | D Bonds | I Bonds | D Bonds | I Bonds | D Bonds |
| 1970 | 2,260 | 12,086 | 21.41 | 11.09 | 81.1 | 40.9 |
| 1971 | 4,789 | 13,172 | 22.57 | 13.29 | 77.8 | 52.6 |

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[34] Statistics for years 1964-66, see note 1 *supra*. Statistics for years 1969-71, see note 8 *supra*.

[35] ILL. REV. STAT. ch. 38, §110-7(g) (1971).

[36] Note 28 *supra*, and figures compiled from the records of the Clerk of the Court of Cook County.

| | Quantity Judgments | | Quantity Bond Reinstatements | | Percentage Reinstatements to Forfeitures | |
|---|---|---|---|---|---|---|
| Year | I Bonds | D Bonds | I Bonds | D Bonds | I Bonds | D Bonds |
| 1970 | 1,868 | 6,361 | 392 | 5,785 | 17.3 | 47.8 |
| 1971 | 3,649 | 6,455 | 1,140 | 6,717 | 24.4 | 50.9 |

## ANALYSIS

The criminal penalties for bail jumping and the basic theory on which the Illinois bond system is based are defined in section 32-10 of the Illinois Criminal Code.[37] Statistics indicate that this statute has been seldom enforced. For purposes of this article a sample was taken in the preliminary hearing and misdemeanor courts of some 3,500 cases in 1970 and 1971, which revealed that only three of these cases were being prosecuted for bail jumping. The post-indictment sample showed a far greater number of prosecutions; of the 750 cases in the sample population, 23 were being prosecuted for bail jumping. Yet, in 1970 and 1971 approximately 18,333 defendants were amenable to prosecution for violation of section 32-10. Thus, if the theory is that potential bond jumpers will be deterred by possible penal punishment, it has evidently not become reality. Certainly no court-wise defendant is deterred in the least, since the failure to initiate prosecution for violation of this statute has become common street knowledge.

A major reason for the failure to prosecute bail jumpers is that little effort is made to apprehend the defendant after a warrant is issued. There are few police officers assigned to this warrant duty; only two or three per police district. These officers are responsible for serving all warrants including the scofflaw multiple parking violations. Seemingly, the apprehension system depends on the defendant being picked up on another charge or traffic offense, and catching the warrant when he is fingerprinted and run through the Bureau of Identification, since rarely do these officers have time to search for a fugitive.

There are several possible explanations for the disparity between "D" and "I" bond reinstatement of forfeiture warrants. First, the defendant has a monetary interest in the "D" bond which he does not have in the "I" bond. Second, the defendant given an "I" bond has no prior criminal record or at least only a minor one, and is generally not picked up on another offense. Third, a judge who has once granted a defendant the privilege of release might well hesitate to reinstate the bond once he has already trusted this particular defendant to be released on his own recognizance. Finally, both the court and prosecutor know that the attorney appearing before the court with the defendant, making a motion to vacate a bond forfeiture, in all probability depends on the proceeds of the bond as part or all of his fee, and would hesitate to deny or obstruct that motion. In essence, what has happened is that the greater portion of the retrieval function of these fugitives has fallen on the private attorney who must bring his defendant before the court in order to protect his fee. Consequently, one of the functions of a professional surety, supposedly obviated by the bond reform, has become the responsibility of the privately retained defense counsel.

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[37] Note 2 *supra*.

The "D" bond or deposit of 10% is a seemingly worthless system without logical foundation. For instance, if a bond of $5,000 is set by a court, that defendant must post only $500 to obtain release. If the defendant fails to appear, a judgment is taken for the excess due on the bond. Generally, the county only collects the $500 posted as 10% of the bond. The records of the Clerk of the Court of Cook County indicate that in 1969 there were $519,764 in excess judgments; in 1970, $662,036; and in 1971, $733,519. Research efforts fail to reveal one cent in excess judgments being *collected* in Cook County.[38] Further, since the 10% requirement is altogether arbitrary, it should follow that if an actual bond is to be $500, the bond should be set at that figure.

On the positive side, allowing the attorney to collect his fee by having the defendant sign over the bond slip after the case has been disposed of in some manner has genuine merit. Such practice is a substantial crime preventive measure, since the defendant will not be under pressure to meet the monetary demands of his attorney or to make bond simultaneously.

## EVALUATION OF THE ILLINOIS BAIL SYSTEM

While this broad evaluation demonstrates the basic weaknesses that now plague the Illinois bond system and will severely impair the Illinois criminal justice system in urban areas like Chicago, it is suggested that the initiation of the following might improve the Illinois bond system.

First, judges should be assigned whose sole function is to set bond. This action would remove the initial burden from the now overcrowded preliminary hearing courts, since the 1970 Illinois Constitution has guaranteed, unless expressly waived,[39] a preliminary hearing to practically every defendant. Illinois has already instituted a night bond court and a "holiday court," where judges are temporarily assigned only to make available to a defendant the quickest possible bail hearing. A defendant in a non-capital case would be taken first to this judge who would conduct the bond hearing and set bond. The defendant, in the case of a felony, would be assigned to a judge for a preliminary hearing; and, in the case of a misdemeanor, would be assigned to a court for trial. If the defendant continues to be detained as a result of his inability to meet the conditions of release initially imposed, he can ask that bond be reviewed by the judicial officer to whom he has been assigned. A time limit for review should be established as in federal criminal procedure, where after 24 hours the defendant can request review.[40] However, in federal procedure the review is first made by the judge imposing the conditions of release. The constitutional guarantee of a prompt preliminary hearing in Illinois would obviate this procedure. Hence, the reviewing judge would not be conducting a hearing *de novo*, since he would have before him the record of the previous bond hearing. Moreover, the time consumed by this review would be minimal.

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[38] Recently a policy has been instituted in which excess judgments have been filed with the Recorder of Deeds so that if a defendant against whom a judgment has been taken attempts some sort of real estate transaction, that judgment will prevent the transaction until it is satisfied.

Further review would be available to the defendant accused of a felony after indictment at the arraignment and trial court level. The judges sitting in the bond courts should be permanently assigned as are the judges in the night bond and "holiday court". Understandably, this is a difficult judicial position; however, it simply requires a jurist of substantial stature to establish procedural safeguards and proper administrative structuring.

Second, sufficient information should be supplied a judge so that he can set a proper bond. Personnel should be available to interview defendants and to verify that information. An attorney, as an officer of the court, should be required to provide the court with substantial background information, accurately verified by himself, and information supplied by the defendant or other witnesses should be brought before the court. Further, the witnesses should be advised of the danger of committing perjury and any violation should be vigorously prosecuted. Verification procedures should be maintained following release, and timely personal reminders to defendants of their court date would save a lot of bond forfeitures and paper work at a later date.

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[39] Ill. Const., art. 1, §7, (1970).
[40] 18 F.C.A. §3146(a).

Third, both a vigorous system of apprehension of defendants not complying with bond appearance requirements and rigid prosecution of bond jumpers would put teeth in the penal provisions of the statute. Although the present ease of vacating bond forfeitures by attorneys who appear with their clients should not be eliminated, since it would both discourage fugitives from voluntarily appearing and cast the burden of rearrest on the police, the repetition of the process by a single defendant should be promptly discouraged by the court.

These first three recommendations are not novel, but in some form or other have been suggested by most bond studies. They would necessitate an increase and shift in manpower; however, any increase in expenditures would quickly be more than countered by savings in jail costs, administrative procedures, and other losses incurred under the present system.

A fourth suggestion adopts the highly controversial position of providing for the valuable alternative of placing the responsibility of a defendant's appearance on an ethical insurance company. The trend of the most scholarly thinking has been for the elimination of the professional bail bondsman.[41] The Illinois bond system was established to correct that problem and give the judge complete discretion in setting bail.[42] Notably, however, the federal statute governing bail did not eliminate the bail bondsman but, rather, made specific provisions for the existence of professional surety companies[43] and their power to arrest and deliver the defendant. The continued existence of these insurance companies within the federal system has certainly established their viability and usefulness. Consequently, the omission of this valuable tool in Illinois has limited the complete discretion of the judge.[44]

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[41] Murphy, *Revision of State Bail Laws*, 32 OHIO ST. L.J. 451 (Summer 1971).

[42] Bowman, *Hearing S. 2839 and S. 2840 before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 88th Cong. at 164 (1964).

[43] 18 U.S.C. §§3142 and 3146(a)(4) (1969). §3142 provides: "Any party . . . who is released on the execution of an appearance bail bond with one or more sureties, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy . . . ."

[44] Absolute discretion does not exist in the federal system, since preferred release methods are stipulated by the Federal Bail Reform Act of 1966. 18 U.S.C. §3146(a)(4) (1969).

> Release in non-capital cases prior to trial.
>
> (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his

Although the spirit of the Bail Reform Act is to favor non-financial conditions of bail where the defendant lacks "means and roots," it becomes appropriate to be as reasonably assured as is practical that the bail givers are not intending merely to free the defendant, but have a real interest in his appearance.[45]

There exist several cogent reasons why the insurance company alternative should be made available to the judge setting conditions of pre-trial release.[46] Where non-financial conditions appear insufficient to guard against flight, there should exist some provision by which the judge may require the placement of a surety bond with an ethical insurance company.[47] Also, the bond forfeiture rate prior to the Illinois Bond Reform Act was substantially lower than after the elimination of the professional bail bondsmen. Under the surety system, there was a 7.7% default rate in the First Municipal District of the Circuit Court of Cook County.[48] In recent years, the forfeiture rate on "D" bonds has lingered around 13% in the First Municipal District.[49] There would be a substantial monetary incentive to the pursuers of absent defendants as well, since the surety companies would be placing bonds of a more substantial amount.[50] Finally, adoption of this proposal would increase the number of civil judgments in cases where the surety company provides for the release of a defendant. Presently, there are no collections made of excess judgments on "D" bonds and "I" bonds. A vigorous enforcement and collection policy on

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> discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:
>
> . . . .
>
> (4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.

Failure of a federal judge to observe these established priorities is an abuse of discretion. United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970).

[45] United States v. Melville, 309 F. Supp. 824 (N.D.N.Y. 1970).

[46] The existence of the bail bondsman and his function have been specifically recognized in Taylor v. Taintor, 83 U.S. 366 (1872).

[47] The extensive subcommittee hearings held prior to the passage of the Federal Bail Reform Act of 1966 did not reveal any weakness in the custodial function of sureties.

[48] Kamin, *Bail Administration in Illinois*, 53 ILL. B.J. 674, 680 (1965); Bowman, *Illinois Ten Per Cent Bail Deposit Provision*, 1965 ILL. L.F. 35, 39.

[49] In 1969 the figure was 13.34 per cent, 1970 — 11.09 per cent and 1971 — 13.29 per cent.

[50] Critics of the surety system hold that it should be completely eliminated; the most prominent of these, Foote, has stated:

> The claims that bondsmen provide any significant function in policing those on bail and finding them once they have absconded seem frivolous to me. There is no evidence that they actually perform any significant custodial function and it is unreasonable to expect them to do so.

Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125, 1162 (1965).

outstanding bond forfeitures could realize substantial sums of money when added to the collections of the 1% administrative cost now placed on "D" bonds.[61]

## CONCLUSION

The ideal situation is to have a well-informed judge with broad discretion make an unhurried determination of the pre-trial release condition necessary to insure the appearance of a particular defendant. The Illinois bond reform was a brave step, but as a working system there are some observable weaknesses which must be corrected.

What is recommended is to give the judge setting bail all the tools he needs: proper information, a selection of all possible pre-trial release procedures, and tools for vigorous enforcement and prosecution of bond jumpers.

The judicial official making the critical decision of what pre-trial release conditions should prevail as to an individual accused should have sufficient time to make that determination. In order to have the necessary and adequate time to weigh the myriad of variables, the judge cannot be forced to operate a priority system of preliminary hearings, bond hearings, motions to suppress, and misdemeanor bench trials. His task must be a singular one.

The individual who is incarcerated has a lesser chance of success at trial than the accused who enjoys his liberty on bail, and a judge must be aware of that fact in determining pre-trial release conditions; however, he must also fully appreciate the danger of providing for the easy release of a defendant with recidivist tendencies.

The inclusion of professional sureties in the bonding system will be a controversial suggestion. The many abuses which accompanied the professional bail bondsman in most jurisdictions are well known; nevertheless, the federal experience has demonstrated that the surety system can be a viable and valuable addition to a bonding system when properly regulated. Such regulation and administration are necessary to gaurantee that only solvent and ethical surety companies be allowed to operate. There should be, in addition, statutory definitions of the arrest and retrieval functions of bail bondsmen, with substantial penalties to attach if defined limits are exceeded.

If a judicial officer is given the necessary discretionary power, along with sufficient court time to render a decision, then the first brave promise of the Illinois bonding revolution can be realized in fairness to both the accused and society.

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[61] Note 1 *supra*, at 276.

### TOOLEY ATTACK ON SYSTEM

THE DENVER POST Tues., June 1, 1976 3

# Bail-Bond Battle Resuming

By CINDY PARMENTER
Denver Post Staff Writer

The battle over the professional bail-bond business in Colorado is on again.

The fight was rekindled in May when Denver Dist. Atty. Dale Tooley recommended the elimination of the bail-bond system in Colorado.

Tooley's proposal calls for the 1977 Colorado Legislature "to abolish bailbonding for profit" and replace it with a 10 per cent cash bond system for all persons charged with felonies.

The resurrection of the controversial suggestion, which the district attorney first proposed for adoption in Denver almost three years ago, has brought cries of anguish from the state's bail bondsmen.

**ACKNOWLEDGING CONCERN** about losing their businesses, the bail bondsmen argue vehemently that they serve a function vital to the continued smooth operation of the states court system.

Tooley thinks the system could survive very well without the bondsmen.

He believes the crime rate would diminish if people didn't have to obtain money, equal to 10 per cent of their bond, to pay bondsmen. Some bondsmen also require additional security, such as property, for the rest of the bond.

The district attorney speculates crimes occur after a bondsmen writes a bond for a defendant who has paid only a portion of the 10 per cent fee and promised to pay the rest in instalments. Or, sometimes friends or relatives steal to get the needed cash, he said.

The district attorney emphasized the 10 per cent cash system would permit the return of the bond amount when the criminal case terminates.

**"PEOPLE WOULD BE ABLE** to get money to post a bond if they knew they were going to get it back," Tooley contended.

Bondsmen and other opponents of Tooley's proposal reply that very few crimes are committed to get bond money. Most crimes result from attempts to get enough cash to hire a lawyer, they reply.

However, most defendants who have low incomes or few resources are provided with a public defender free.

"We get people out of jail so they can go back to their jobs and not lose them," One bondsmen argued. "Most of them pay us a little a week after we get them out on bond. Some of them never pay us at all."

Court observers suggest that without bondsmen, some people would never get out of jail.

The district attorney's argument for a 10 per cent cash bond system is bolstered by figures which show only 4 per cent of the persons granted cash bonds in Denver District Court during the last six months failed to appear.

**THE BONDS WERE** granted through an experimental program approved by judges in Octobert 1973. Tooley asked at the time for the establishment of a permanent 10 per cent cash-bond system. But, the judges refused.

The failure to appear figure for all bonds was 8.4 per cent during the same period.

Court figures for a six-week period immediatley before the district attorney's proposal showed that of 304 felony bonds, 49, were 10 per cent cash bonds. Of the remaining number, 111 were posted by professional bondsmen; 28 were property bonds; 13 were cash (where the full amount is posted) bonds, and 103 were personal recognizance bonds.

Tooley's proposal was accompanied by instructions to his deputies to either recommend or not oppose requests for 10 per cent cash bonds in all felony cases. As a result, most persons now are being released on 10 per cent cash or personal recognizance bonds.

The 4 per cent failure to appear figure on 10 per cent cash bonds may have been affected by the screenings conducted by the district court's Pretrial Release Program.

**THE PROGRAM, FUNDED** by the U.S. Law Enforcement and Assistance Administration (LEAA), the state and the City and county of Denver, prepares immediate capsule profiles on all persons arrested in Denver.

If the individual earns a proper number of points — based on such things as length of residence in Denver and past criminal record — he is eligible for a 10 per cent cash or personal recognizance bonds.

However, since Tooley's call for more 10 per cent cash bonds, the eligibility requirements have had to be slackened.

The Pretrial Release Program's staff provides regular followup to make certain the defendants, recommended for release by the office, make required court appearance. Bondsmen make similar followups on their clients.

Proponents of Tooley's suggestion point out that pretrial release might be continued on a permanent basis and be financed by a 10 per cent fee collected from all persons who post 10 per cent cash bonds.

**ONE OF THE KEY** questions about the future of bail bonds for profit in Colorado centers on the problem of returning persons who have jumped bail.

Bondsmen acknowledged and their opponents point out that only about 5 per cent of the returned bailjumpers are caught by bondsmen. The rest are arrested in other states on a variety of charges and returned when it's discovered they're wanted in Colorado.

The bondsmen contend, however, the network of bail bondsmen throughout the United States leads to some of the arrests.

They also are quick to emphasize that if they signed the bonds, they must pay to have the individual returned.

"The minute a person we have on bond is gone, we start looking for him," said Bob Stockton, president of the Colorado Bail Bond Association. "If we don't find him and bring him back, it's going to cost us money."

The Denver Sheriff's Department spent a total of $31,911 last year returning prisoners who jumped bond in Denver. Of that total, bondsmen reimbursed the department for $7,272 and the court for most of the remaining amount.

**IF A PERSON, WHO** fails to appear, has been free on a 10 per cent or personal recognizance bond, the state must pay the cost of returning him.

Part of that expense is absorbed by the 10 per cent cash premium held by the court.

There also is the problem of attempting to collect the remaining 90 per cent of a forfeited bond.

A check of such bonds forfeited in the Denver court since October 1973 revealed that the Denver district attorney's office has made little effort to collect the forfeited amounts.

Professional bondsmen are required to pay the amount of the bond—frequently reduced by judges at forfeiture hearings—if a defendant fails to appear in court within a reasonable period of time.

District court records show that 15 bond forfeitures totaling $24,770 have been collected from professional bondsmen during the past six months.

**TO GUARD AGAINST** disappearances, Tooley has called for a law change to accompany the new bail system. The revision would permit the filing of criminal charges—rather than the current contempt proceedings—against a person who failed to appear.

The Denver County Court cash bond fiasco of the 1960s was caused largely by the virtual impossibility of collecting the remaining 90 per cent of the bond when the defendant failed to appear. The system was established for misdemeanor cases.

George Manerbino, county court presiding judge, recalled that despite the efforts of county court marshals and finally a collection agency, only about $7,000 of $372,000 in forfeited bonds was collected.

The bad bonds were turned over to the agency after a Denver grand jury issued a critical report about the county court situation.

**ASKED ABOUT THE** new cash-bond proposal, Manerbino said it would work only if a special office was created to handle it.

"Normally, cash bonds are the responsibility of the prosecuting attorneys and they're not staffed adequately to do that in addition to their other duties." Manerbino said.

Chief Judge Robert T. Kingsley of Denver District court said, "We couldn't possibly make the 10 per cent cash-bond system work.

"If we had that system, many people would just stay in jail even though they have a constitutional right to bail. Bail bondsmen are a big help to the court. We use their services," he said.

The Colorado proposal is part of a slowly developing trend, which began with the Manhattan Project in New York City in 1961, toward elimination of the bond-for-profit system.

Sat., Sept. [illegible], 19[illegible], Denver, Colo. Rocky Mountain News—5

# District judges shun Tooley bond view

By JEFF ROSEN

*News Staff*

Denver district judges Friday rejected a proposed rule under which many criminal defendants would have been able to post a 10 per cent cash bond instead of relying upon professional bail bondsmen.

Chief Judge Robert Kingsley said he and his colleagues felt the bonding proposal, which was submitted by Dist. Atty. Dale Tooley, would have increased bond forfeitures and placed a heavy burden on the courts and law enforcement personnel charged with locating suspects who skip bond.

Denver County Court judges will consider the proposal at a meeting Oct. 4.

Tooley recommended the 10 per cent scheme earlier this month in a letter to Kingsley and Presiding Judge George A. Manerbino of Denver County Court.

**OPTION SUGGESTED**

He suggested that judges be given the option of allowing a defendant to pay 10 per cent of the bail sent to the court clerk's office in cash. If the 10 per cent figure came to less than $50, Tooley added, defendants should have to put up $50.

A defendant who appeared for his scheduled hearings could reclaim his money at the close of legal proceedings.

Under the present system, someone who can't afford to post the full amount required by the court often turns to a professional bailbondsman who, for 10 per cent of the bond, will promise to pay the court the full amount if the defendant skips. Bondsmen generally require some form of security for the balance of the amount, and they keep the 10 per cent as their fee.

If the rule was widely used by local judges, Tooley's scheme could deal a serious blow to the professional bailbond industry.

"Naturally I'm against it," said veteran bondsmen Henry Veto in a telephone interview Friday. "It would practically put us out of business."

Veto added that bondsmen make "strenuous" efforts to locate "skippers" and as a result cut down on the police department's workload. "A bondsmen's got to find them," he said. "If he doesn't, he loses his butt."

A scheme similar to Tooley's was squarely defeated in the State Legislature last year in part because of the lobbying efforts of the professional bondsmen.

And Friday's meeting among district judges suggests that the scheme is still far from fruition.

**REASON CITED**

Kingsley said the failure of a 10 per cent bonding procedure in County Court in the late 60s was a major reason he and his colleagues were skeptical.

The County Court experiment was started in 1966 during a strike by professional bondsmen. Unlike Tooley's proposal, the system wasn't discretionary. All persons accused of ordinance violations or misdemeanors could be freed if they put up 10 per cent in cash.

By the end of the three-year experiment, Manerbino and Kingsley said, the court was trying to retrieve $377,000 in uncollected bonds. Only $6,800 was collected.

In a sense, the uncollected figure doesn't represent real money. Defendants who skipped immediately forefited their 10 per cent, and judgments were entered against them for the remaining 90 per cent. At the time, all ordinance violations carried a $300 bond and all state misdemeanors a $500 bond.

When the 10 per cent procedure was scrapped in mid-1969, the County Court revised its bail schedule lowering all bonds drastically, often to only 10 or 20 per cent of the earlier figure. A defendant bonded under the new schedule could skip town, forfeiting about the same amount he forfeited during the experiment without adding several hundred dollars to the court's uncollected-judgment accounts.

On the other hand, the forfeiture rate during the experiment was 16.2 per cent of all bonded defendants. It has since dropped to 7.5 per cent, according to Manerbino. The judge, however, said he wasn't sure how closely the drop is tied to the change in procedures.

Tooley said he thinks his proposal is far superior to the unsuccessful one undertaken seven years ago because his rule would merely make 10 per cent bonds an alternative open to judges.

"One reason those uncollected figures were so high," he said, "is that a lot of people got 10 per cent bonds when they should not have. It should be up to the judge."

Tooley said he hopes Gov. John Vanderhoof will place a 10 per cent bonding proposal on his agenda for the upcoming session of the State Legislature.

"I think bail bond reform is a trend," the DA added.

In a letter explaining his proposal he said, "The very system which we are advocating has worked successfully in Boulder for some time."

Bill Wise, assistant district attorney in B
der said when contacted by the News tha
"didn't know the system was in up here a
yet."

After checking with the Boulder public
fender's office, Wise reported that since
last year a "handful" of 10 per cent bonds h
been granted to defendants.

"I wouldn't say it's been particularly
cessful here, but then again we don't re
have a large enough sampling to know,"
added.

Despite the defeat of the scheme in dis
court Denver County Court judges might de
to adopt the rule for use with defendants
cused of misdemeanors and ordinance vio
tions. Manerbino wouldn't speculate on w
his colleagues will decide Oct. 4.

San Jose Mercury
SAN JOSE, CALIF.
D. 126,382

# No-Bail Program Costly For San Mateo County

By **DAVID JOHNSTON**
**Mercury Staff Writer**

REDWOOD CITY—It is costing San Mateo County taxpayers more money to run a program to release arrested persons without *bail* than it would to buy them bail bonds.

The county has budgeted $71,000 to operate a release-on-own-recognizance (OR) project in which persons are investigated at their request and recommendations made as to whether they should be released on their promise to appear for future court proceedings.

This year officials of the OR project anticipate only about 800 persons will be released without bail through their efforts. That means the investigation and related paperwork costs about $88 per person released.

A check with local bail bondsmen showed most bail bonds issued are for only $41-$71, indicating bails of $331-$710.

George Riley, executive assistant to Tarshes, agreed the program costs more than buying bail bonds would.

"We thought about buying bail bonds for these guys—not very seriously, but we thought about it. We figured if we could get a lot of people out for $10 or $30 it would be a good deal, but, of course, we can't use public monies to buy bail bonds," Riley said.

He said an analysis he made shows the amount of bail money collected has continued to rise since the program started, mostly because of increased arrests, and the average bail per person has not decreased.

"We have not been able to detect from complaints that the program has cut into the bail bond business," Riley said.

He said complaints from bail bondsmen would indicate too many persons who can afford to buy bonds are not doing so. The lack of complaints, he said, tends to show poor persons are being helped more than those of more substantial means.

Riley's study showed the percentage of persons bailed decreased from 65.7 per cent in 1969 to 59.9 per cent in 1970. Those on OR increased from 3.9 to 5.9 per cent. The percentage held in custody moved up from 30.4 in 1969 to 34.1 in 1970.

The OR project is also used in some cases to get bails reduced, he said.

John Wiechman, program supervisor and acting director, gave the 800-person OR figure expected through the program this year.

His team of six investigators will interview nearly four times that many persons, however.

Many interviewed and checked out by the investigators on their qualifications for release on their own recognizance will bail out before their OR request can be approved by a judge.

Wiechman said he has no figures on what percentage of persons interviewed are checked out and their requests given positive recommendations only to find they have bailed in the interim.

Wiechman has no figures on what bail would be for those released with aid of the OR project.

There are also no figures on the race or income of the 639 persons OR'd in 1970.

Tarshes told supervisors:

"The purposes of the program are to provide a service for low-income persons who are apprehended and cannot otherwise raise sufficient money for bail, and to help relieve overcrowded jail facilities."

Sheriff's Lt. Richard Platt, main jail supervisor, said without the program a new jail would be sorely needed.

"We are running slightly below capacity on weekdays and over capacity on weekends," Platt said. The jail is designed to hold 233.

It costs the county about $12 per day to keep a person in the main jail. A one-week jail stay would be cheaper than operation of the OR program.

"That's true," said Bill Jackson of the county manager's office, "but there are other costs. If a guy loses his job because he's in jail his family may end up on welfare, his being in jail is not helping his family and it doesn't accomplish anything."

Platt said the program at the very least "is forestalling the day when we will have to spend a couple of million bucks to build a new, larger jail."

Under the program, OR project investigators visit the main jail each weekday morning and Sunday through Thursday nights. They review booking information and look over arrest records. Then inmates are brought up for interviews.

Persons charged with crimes involving violence against a third party and those with certain other major charges are usually weeded out of the program at that point.

# WHICH ROAD TO BAIL REFORM?

By William E. Roe

More than 30 years ago, the late Winston Churchill coined a phrase which thousands of speakers have borrowed to discuss topics to complex to describe. Churchill used the words "a riddle wrapped in a mystery inside an enigma."

That's the most apt phrase I can draw on to describe one of the most difficult social problems in America today - how do we mete out criminal justice while protecting both the rights of the individual and the rights of society?

How do we resolve the conflict between two basic legal traditions? On the one hand, our system of justice has been firmly established on the premise that any individual is presumed innocent until proved guilty beyond a reasonable doubt. At the same time, our laws also have established the right of society to protect itself from the habitual criminal - the incorrigible who repeatedly rejects all efforts to rehabilitate him.

That conflict - between the rights of the individual and those of society - has been the focal point of a great national debate over the last decade. The issue is what to do with a defendant in a criminal action between the time he is charged with the offense and the time of his trial. And if you think this issue is simply an academic exercise of interest only to courtroom lawyers, look at it again. How the question is resolved can affect the liberties of each of us who calls himself an American citizen.

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William E. Roe was president of Allied Fidelity Corporation and its wholly-owned subsidiary Allied Fidelity Insurance Company. He formerly was a police officer and has more than a decade of experience in the bonding and surety business. The parent company was formed by Roe in 1960 under the name of Allied Agents, Inc. The name was changed to Allied Fidelity Corporation in 1973. The subsidiary company, Allied Fidelity Insurance Company, was organized in 1969 to write all types of fidelity and surety bonds. The insurance firm is an Indiana stock company and holds certificates of authority for various lines of insurance, including fidelity and surety, in Indiana, New Mexico, Kentucky, Texas and Utah. Allied Fidelity Corporation also is managing general agent for Midland Insurance Company of New York.

For almost two centuries our legal system recognized that most defendants could be released from jail pending trial for all but the most serious offenses. The procedure involved financial guarantees by the defendant or his backers that he would be present for all required court appearances. After considering the degree of risk that the defendant would take flight, a judge would impose financial conditions for the pre-trial release. The defendant, or his bondsman, would then deposit the required sum with the court as evidence of the intention to reappear. If the defendant failed to appear, he or his bondsman forfeited the money.

This money bail system can be traced back to medieval England and has been a key tool in our system of criminal justice from the time of the colonies.

No one has been able to pin down precisely, however, the beginnings of appearance bonds as a commercial venture. Somewhere in the dim past, the bondsman determined that he should be rewarded for the high risk involved in depositing money for a defendant who may or may not appear. Thus, he began to charge the defendant a premium for his services - usually about 10 per cent of the total amount required by the court.

Money bail was the backbone of our pre-trial release system - and continues to be in most states - until the 1950's when critical voices were raised against it.

Three basic objections to the money system were raised:

1. It was charged that the system discriminates against the poor and benefits the rich. According to people like former Attorney General Ramsey Clark, the inability of the poor to pay even the premiums for bail bonds caused hundreds of them to remain in jail for weeks, sometimes months, despite the fact that no court had found them guilty of anything.[1] Meanwhile, the wealthy - including the most corrupt syndicate mobster - could purchase their release in a matter of minutes.

2. There also was criticism that the money system permitted judges to manipulate bail and punish especially abrasive characters before they even came to trial. This was done primarily by setting bond so high that the defendant could not possibly pay the bondsman's premium.

3. A further charge zeroed in on the bondsmen. It was argued that they were getting rich at the expense of the poor, that they were corrupting justice officials, that they were piling up too much power, and that some of them were little more than street-gang ruffians who were given to strong-arm tactics when chasing down persons who had jumped bail.

Frankly speaking, it must be admitted that there is a degree of validity to all of those charges.

The system does work at times to the disadvantage of the poor. And I don't want to rationalize that criticism away by suggesting that all our other systems - political, economic, and social - also seem to work against the poor at times. In equality before the law based on economic class is an inexcusable abuse which must be remedied.

Also, it must be said that some judges *may* use money bail as a weapon to punish people they dislike - *but most do not*. To suggest generally that judges show partiality in fixing bail raises serious questions about their ability to show impartiality in other judgments of a court. If we cannot trust judges to fix bail fairly, where do we begin trusting them in rendering other decisions? Don't such charges undermine public confidence in our entire judicial system?

Candor also requires me to confess that the bonding business has its share of "rotten apples." There are some bondsmen who are corrupting influences, who throw their weight around, who have little sense of public responsibility.

In response, I have two observations about this criticism:

1. A bondsman, no matter how "rotten," can't corrupt anybody unless he finds a coruptible jurist or law officer. Corruption requires collusion! It seems obvious that to lash out at bondsmen also includes a backhanded slap at judges and policemen.

2. Remedies against corruption have always been available - either in existing laws or new legislation. Where corruption has existed, either available laws were not being enforced or they were not adequate. I will return to this point later.

In summary, the money bail system came under fire in the 1950's, and as the criticism snowballed it became excessive to the point of being unreasonable. The critics painted with bold strokes and a wide brush. Instead of talking about specific reforms, they pushed for such wholesale changes that the bail bondsman's role was virtually eliminated.

Critics of the money bail system brought the issue to a head in the U.S. Congress in 1966, and the result was passage of the Federal Bail Reform Act. Under the law, federal judges were required to release on their own recognizance - their own promise to return for trial - all persons arrested for non-capital crimes.

The law prevented judges from considering whether the accused might commit other crimes while out of jail.

It was this type of law that U.S. District Court Judge George L. Hart described in these words: "If a defendant promised me he was going to murder three persons, I would have to let him go."[2]

The only basis for confining any person arrested was reasonable doubt about whether he would return for trial. To help the jurists make this decision, the District of Columbia Bail Agency was established. This group - drawing on young lawyers, law students, and social workers - questioned the defendants and investigated their records. They then passed on their recommendations about the reliability of the defendant.

It did not take very long to prove that the Bail Reform Act would not work. In less than three years, President Nixon appealed to Congress to amend the act. What had gone wrong?

One part of the problem was spelled out by the President in a message to Congress in January, 1969. He said: "Increasing numbers of crimes are being committed by persons already indicted for earlier crimes but free on pre-trial release. Many are being arrested two, three, even seven times for new offenses while awaiting trials."[3]

The President was understating a major problem. In the period from 1966 to 1969, Washington, D.C., became a capital of crime. In seven major crime categories, the number of offenses rose from 29,251 to 62,571 - more than double in four years.[4]

Another problem lay in the inability of the Bail Agency to function effectively. Its personnel were spread too thinly to do a good job of screening the defendants for pre-trial release. And it was almost toally incapable of carrying out another of its duties - supervising the activities of those out of jail awaiting trial.

This led the President to ask that the size of the Bail Agency be almost tripled, with a considerable increase in budget.[5]

The Administration also pushed for another change, which resulted in one of the stormiest controversies before Congress in the 1969 - 1970 session. The President asked for a preventive detention measure which would authorize judges to imprison those waiting trial for crimes of violence if there were reason to believe the community would not be safe with their pre-trial release.

Preventive detention was opposed by a wide variety of persons and groups - law school deans, the D.C. Bail Agency itself, the American Civil Liberties Union, New York District Attorney Frank Hogan, and North Carolina Senator Sam Irvin, the most vocal critic.[6]

They argued that the preventive detention amendment was a risky precedent and that giving judges the authority to jail persons only suspected of crime was playing loosely with civil liberties guaranteed in the Constitution.

Despite their protests, the preventive detention measure was passed and signed into law July 29, 1970. It authorizes federal judges to detail up to 60 days those persons charged with dangerous crimes.

Even with the preventive detention amendment, the Bail Reform Act is not working. With the hard-core criminal types presumably locked up for 60 days, the D.C. Bail Agency's most recent report shows 52 per cent of these released on personal recognizance violated one or more conditions of their release. Twenty-five per cent failed to show up for trial, and at least 10 per cent were arrested for other crimes while free waiting trial for an earlier offense.[7]

There is similar experience in New York City, where many courts are experimenting with liberal pre-trial release. According to State Sen. Roy Goodman, a third of all defendants awaiting trial - 177,000 of them - have jumped bail. And, according to Sen. Goodman, they are not being pursued because the police machinery for rounding up bail jumpers has collapsed. His statement is supported by district attorneys in Manhattan, Bronx and Queens.[8]

Meanwhile, in the same city, the Vera Institute of Justice examined the record of bailed and paroled defendants and found that only 4.4 per cent of those released on surety bond failed to appear for trial. The main reason, they concluded, is the fear of losing the collateral given to the bondsman and the fact that he has his own investigators to pursue them.[9]

So, we come down to this - after more than five years of experimenting with substitues for the money bail system we find ourselves with cures worse than the disease.

The record of the last five years leaves us with three options:

One of to continue with liberal bail release programs - letting defendants go on their own promise to appear for trial.

The record of Washington and New York points up the risks in that course - large number failing to appear for trial, many defendants freed without adequate supervision, and additional crimes being committed while the accused is free on his own recognizance.

It must be stressed that a personal recognizance program might work under certain conditions, but those conditions would impose a much larger cost to the taxpayer. If every court had a huge staff of pre-trial investigators and conducted thorough, indepth interviews, the courts might be able to make better judgments about which defendants to retain in custody. And if every court had available a large staff of field supervisors, the freedom of the defendant might be scrutinized more closely.

But to carry out this option effectively would require the creation of an awesome judicial bureaucracy and ever-mounting costs. The budget of the District of Columbia Bail Agency offers a case in point. Its budget for fiscal 1970 was $148,400. It's budget for fiscal 1971 is $337,035 - nearly two and half times as much.[10]

Similarly, a program in Marion County, Indiana, has a proposed budget of $2.2 million for a personal recognizance experiment over the period 1971-1975. The proposal calls for two-thirds to be provided by the federal government, the rest to be raised at the state and local level."

For all practical purposes, this liberal release option would put the government into the bail-bonding business, crowding private enterprise out of the picture. This option leaves much to be desired.

The second option is to move increasingly toward preventive detention, giving judges arbitrary power over persons only accused of crime. That option also poses problems.

First, there is the constitutional issue. At the federal level, there have been several court decisions focusing on the meaning of the Eighth Amendment to the U.S. Constitution - where it states that "excessive bail shall not be required." Does this clause imply that defendants have an absolute right to bail?

Historically, courts have held that bail is not an absolute right in federal courts where a capital offense is involved. Also, courts have ruled that defendants do not have an absolute right to bail while their conviction is being appealed to a higher court.

A prominent legal authority, Sen. Sam Irvin (N.C.) points out, however, that one significant issue remains to be resolved -

whether the amendment provides absolute right to bail prior to trial in non-capital cases.

Opposing the preventive detention statute in 1970, Sen. Irvin said: "Although I am personally satisfied that preventive detention prostitutes the purpose of bail and runs afoul of the Eighth Amendment, the constitutional implications would remain unclear until a case raising them reached the Supreme Court."[12]

To date, the Supreme Court has not spoken on this question.

Secondly, at the state level, preventive detention statutes would require constitutional amendments in most cases - and that is no easy task.

As Deputy Attorney General Richard Kleindienst explained to the Senate Judiciary Committee in May, 1970, more than 35 states have clauses which establish an absolute right to bail in non-capital cases.[13]

In Indiana, for example, the right to bail is specifically guaranteed in Article 1, Sec. 17 on the Constitution:

> "Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident or the presumption strong."[14]

There also are other compelling arguments against preventive detention.

A recent study released by the American Bar Association, for example, shows that defendants jailed before trial are more likely to be found guilty and committed to prison than those released. There is strong reason to suspect that pre-trial incarceration helps pre-judge the case.[15]

Also, because detention often results in loss of employment, those not released are less likely to be able to afford private counsel. This poses an unnecessary burden on already-overworked public defenders. There also is some evidence to suggest that defendants are found guilty more often if they have court-appointed attorneys rather than private counsel.[16]

The loss of employment also brings undue hardships on the family of the accused. Why should the wives and children be forced into deprivation because of the court system?

Finally, there is the question of economics. Preventive detention adds to the number of persons jailed before trial. And that results in increased costs for administrative personnel, more courts and jails, and additional per diem costs for maintaining prisoners - all this at a time when jails already are filled to overflowing.

Clearly, preventive detention is not an adequate answer to the problem.

If neither bail release nor preventive detention is the solution, what remains? The answer has been there all along - let's bring about needed reforms in the money bail system.

Here are some steps we could take:

1. We must take a closer look at the licensing procedure for bail bondsmen across the country. What standards can be applied to upgrade the quality of people entering the field? And what regulations need to be adopted to "weed out" the unscrupulous bondsmen?

2. We must have an adequate pattern of inspection and enforcement by state agencies to guarantee that appearance bond companies are operating properly and in the public interest.

3. We must guarantee that laws regulating the forfeiture of bond money are reasonable and are applied uniformly. A bail bond is a contract between the state and a private company. Assuming that the bonding laws themselves are reasonable, there is no justification for not enforcing forfeitures uniformly when defendants jump bail. At best, the pattern today, is haphazard. As with a defendant in a criminal trial, bonding companies also have a right to expect fair and equal treatment before the law.

4. In response to criticism that some representatives of bondsmen commit mayhem, we should consider a requirement that every investigator employed by the bondsman should complete a course in apprehension and detention methods at accredited police academies or show proof of previous satisfactory experience with a law enforcement agency. And there should be rigid penalties imposed - including even suspension of the license - when agents of the bondsman violate commonly-accepted standards of behavior.

5. And to protect citizens from crime on bail, we need laws which impose harsher penalties for committing new crimes while out on bail. This punishment should not be imposed concurrently with the penalty for the original crime, as is sometimes now the case, but should be added onto the original sentence.

6. Finally, we need action to assure that the system does not work to the disadvantage of the poor. There is no easy solution to this problem, but here is one idea which may work. It

involves cooperation between government and the bonding companies.

In cases where the indigent cannot afford the premium for his appearance bond, this money could be provided by a government source - perhaps a welfare agency. In determining whether the accused is eligible for such aid, courts could apply the same standards used in deciding that an indigent is entitled to a court-appointed attorney instead of private counsel.

In exchange for the premium money, the court should expect the bonding firm to provide effective pre-trial supervision of the accused. This would make the bonding company an extension of the law enforcement system and would relieve already-overworked police departments.

To prevent bonding companies from being selective about which indigents they underwrite, the companies could be formed into an indigent bail pool. And they could be required to accept the risks on a rotating basis.

In paying the bondsman's premium, the government would be purchasing a service from private enterprise which cannot now be provided elsewhere. And because government money would be used in paying the premium, it would have the effect of keeping the total bond amount at a reasonable figure.

In addition to the similarity between this plan and the manner in which indigents are provided legal counsel at public expense, there are other precedents for such cooperation between government and bonding companies.

For example, federal legislation adopted in 1970 authorizes the Small Business Administration to guarantee up to 90 per cent on losses sustained by surety companies in bid, payment or performance bonds written for minority business contractors.

These are some of the steps we should take to improve the money bail system. It is a moderately conservative approach to the problem. It retains a traditional concept that government and private enterprise can cooperate to do the state's work at a savings to the taxpayer.

We do not have to choose between liberal programs which cannot work without enormous outlays of public money, or repressive detention, which gives jurists unprecedented power and plays loosely with our personal freedoms.

There are numerous bonding companies across the nation which are seeking to perform responsibly in the public interest. Unfortunately, the abuses of a few have given the entire industry a "black eye." The responsible companies should not be required to suffer for the excesses of a few.

Let us not proceed emotionally into unchartered waters. Instead, let us proceed with needed reforms in the existing system. In the final analysis, I believe this private enterprise approach can do a better job for the American public at less expense and, in the long run, will make our nation a safer place in which to work, play and live.

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# HEARING

BEFORE THE

# SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

# COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

## S. 460, S. 1297, S. 1598, S. 1601, S. 1875, S. 2212, S. 2245 and S. 3043

OCTOBER 2, 8, 9, 22, 23, NOVEMBER 4, DECEMBER 4, 1975 AND MARCH 17, 1976

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Senator HRUSKA. Well, you gave us some thoughts which round out a description of a pretty bad situation.

Judge McLAUGHLIN. Yes, indeed.

Senator HRUSKA. Thank you for coming.

Judge BIRNS. Thank you, Senator.

[The statement referred to follows:]

### STATEMENT OF WALTER H. McLAUGHLIN, CHIEF JUSTICE OF THE SUPERIOR COURT, COMMONWEALTH OF MASSACHUSETTS

Mr. Chairman and Members of the Committee: I am the Chief Justice of the Massachusetts Superior Court. It has 45 Associate Justices and one Chief Justice. It is the great trial court of the Commonwealth with unlimited jurisdiction, civil and criminal. It serves approximately six million people in Massachusetts. That is one judge for approximately every 125,000 people and if not the lowest certainly oneo f the lowest judge-per-capita ratios in the entire nation. The national average for a court of general jurisdiction is one judge for every 75,000 people; and there is an evolving standard that there should be one judge for every 50,000 people. It is a circuit court and sits in all of the 14 counties of the Commonwealth. Judges sit either criminally or civilly by my assignment.

The backlog of cases, civil and criminal, facing our court is absolutely staggering. If we are not drowning, we certainly are clutching at straws. Paralysis of our judicial system is avoided only by the industry and the dedication of an able group of talented judges. As of June 30, 1975, there were pending and untried indictments and appeals totaling 38,933 criminal matters. On the civil side of the court, I had pending 89,990 civil jury and jury-waived cases ready for trial. That is a total backlog of 128,923 civil and criminal matters. That is an individual caseload per judge, including the Chief Justice—and I have to run the court administratively—of 2800 cases per judge. It doesn't decrease. It has increased steadily, year by year, by a strong percentage of 5-7%.

This month I have ready for trial in Suffolk County 65 first-degree murder cases. I have eight criminal sessions in Suffolk County. Any capital case will take at least a week to try. In addition to the cases ready for trial, there are over 100 capital cases pending in Suffolk County, and new crime and new indictments are coming faster than we can dispose of them. Pending throughout the Commonwealth are a total of 250 first-degree murder cases, not only now but at any given time. In Barnstable County, on the calm and peaceful shores of Cape Cod, I had to assign myself last month to try three first-degree murder cases which had reached the point that they either had to be tried or they were subject to dismissal for failure to provide a speedy trial.

How do you move this volume of business? I have the philosophy that with the violence and crime upon the streets and in our homes, and with the peace and safety and tranquility of the entire population of Massachusetts at stake, it is my absolute obligation to move the criminal business even at the expense of the civil business. If I have the alternative of trying defendants or freeing them, and that is the alternative, I have the firm policy of trying them. Ten years ago, only about 25% of the judges of our court were devoting their time to trying criminal cases. Today I assign approximately two-thirds of my bench to sit in criminal sessions. This is inevitable because first-degree murder cases are not our only brush with crime. We have rape, we have robberies, we have aggravated assaults, we have all the violence and crime that is the curse of America today and it is the No. 1 domestic problem facing this country today.

Moving the criminal business cannot help but have its victims. I am talking about the real forgotten person in our judicial system, and he is not the victim of crime—although the victim of crime is often referred to as the forgotten citizen. The forgotten citizen in Massachusetts is the lawful, peaceful, every-day, average American who tends to his business and supports his family, who unfortunately has civil business in our courtrooms. It is the businessman, the banks, the wronged, and the injured who are entitled to a civil forum to receive the mandate that our Constitution guarantees to them, namely Article 11 of our Declaration of Rights which provides in substance that ". . . every subject of the Commonwealth ought to find a remedy in our courts completely and without denial, promptly and without delay, conformable to law."

Every day I enter upon my duties as Chief Justice I violate the Constitution and the oath of office I took which mandates me to provide sessions of court sufficient to dispose of the business of the people, civil and criminal. In Massachusetts it cannot be done. It is a sad commentary that so heavy a percentage of our judicial resources has to be devoted to the criminal. It is sad to contemplate that the lawless, those who outrage society, those who trample the rights ofd ecent citizens underfoot, it is sad to contemplate that the lawless have the first call on the services of the court. The result is inevitable. The citizens of Massachusetts are being denied a civil forum; the pathway to the courtroom is not only too long, it never ends. Many of our people never get there because death takes them first. Delay has become an integral part of the practice of law just as much so as the rule in *Shelley's* case.

Massachusetts has the unfortunate distinction of having within its boundaries six of the 12 counties in the nation where the delay in reaching a civil trial is the greatest:

Middlesex County (Cambridge and Lowell) is the slowest in the nation with 66 months delay.

Norfolk County (Dedham), the second slowest with 60 months' delay;

Hampden County (Springfield), the fifth slowest with 47 months' delay;

Suffolk County (Boston), the ninth slowest with 42 months' delay;

Essex County (Lawrence and Salem), the tenth slowest with 41 months' delay; and

Worcester County (City of Worcester), the twelfth slowest with 40 months' delay.

Every other county has at least 36 months' delay in civil matters. I personally have presided over civil cases where both parties were dead and their executors were suing each other. I could not help but think that the original parties could better try or settle their cases in the hereafter and before a better Judge, provided they both went in the same direction in the life hereafter.

Massachusetts has not had a new judge since 1968. There have been three vacancies in our court dating back to May, August, and October which still are unfilled. I am constantly beseiged by district attorneys and law enforcement agencies to provide additional felony sessions. There is no way that I have found how to run a session without a judge; in order to provide the necessary criminal sessions, I am constantly closing civil sessions, robbing Peter to pay Paul, with inevitable further delay on the civil docket. Judges of our court sat all last summer to dispose of 42 first-degree murder cases then pending in order that these cases would be behind us when September rolled around and we would not be drowned by the flood of indictments resulting from summer crime. I am always cognizant of the fact that criminal business must be moved; crime must be controlled; it must be contained or it will surely consume us. But if in the process we trample and destroy underfoot the basic civil rights of all the law-abiding people of the Commonwealth, certainly the precious guarantees of the Bill of Rights and our Constitution to all our people become nothing but pious mouthings to be parroted by school children on the Fourth of July which will exist in name only on a piece of dried parchment under glass on the Freedom Train.

The judicial branch of government is the stepchild of society. The court and its needs stand at the bottom of the totem pole of priority on the tax dollar. Court reform has no sex appeal; it doesn't even have popular support, unless it happens to hit home and a civil litigant is denied a courtroom or an innocent victim is unable to have a trial. The state budget of our Commonwealth this year is $3.43 billion. The judicial portion of the budget is $18.9 million dollars, slightly more than one-half of one percent—less than one penny out of each tax dollar. Counties pay approximately 76% of our state judicial budget. Even if we consider the combined state and local budgets for the entire judicial branch, every court at every level including probation, the judiciary spends only about 2.6% of all state revenues.

Lest it be misunderstood and without elaboration, LEAA has been of little assistance to the Massachusetts judiciary. The state planning agency is the Committee on Criminal Justice, an executive branch agency appointed by the Governor. In 1975, 5% of the block grant funds were allocated to court administration; for 1976, the allocation has been reduced to 2.9%, a reduction of 42%.

What is the effect of this backlog upon our criminal justice system? Law enforcement officiers and police become disgusted with delays; prosecutors and defense attorneys run the risk of unavailable witnesses who move or die; memories are dulled; evidence is lost; and people who may be innocent and whose reputations may be severely damaged by indictment are denied a trial. In order to move the criminal business of the Commonwealth and become current with the civil business within five years, Massachusetts needs desperately 19 additional judges. The Legislature has not responded. Nor has the Legislature authorized the temporary recall of retired justices. Many of these retired justices are still fully capable, willing, and anxious to return to active service; all of them have years of valuable experience. The cost of their services to the state would be miniscule because the recalled judge would receive only the difference between his pension benefits and his pay, that is approximately $9,000 per judge per year.

I do not intend to comment upon national crime statistics other than to point out that it is apparent from the graphs on crime the rate of increase during 1974 was steeper than in any of the previous four years. While crime increased nationally in 1974 by 17%. Massachusetts topped that with 19% and the City of Boston topped it with approximately 25%. Our courts are ill-equipped to deal with this explosion of crime, and the inevitable result is that the most effective deterrent to crime is lost. The most effective deterrent to crime is a speedy trial and the certainty of punishment. Criminals fear being caught; criminals fear being punished; and it is a self-destructing process—diminished deterrence is an incentive to crime and increased crime results in the further deterioration of deterrence. It is like a dog chasing its tail.

For a moment I want to look at the whole criminal justice system in Massachusetts. As intelligent people let us try to find out what we are doing wrong. Obviously whatever we have been doing for the last ten years we have been doing wrong.

. . . Our first contact with the criminal is when we arrest him; the immediate issue is bail. In 1971 our Legislature enacted one of the most liberal bail reform statutes in the country. It created a presumption that a defendant was entitled to be put on the streets on personal recognizance. The court is mandated by statute to try first those defendants who are in jail in lieu of bail. As a result, we never seem to reach for trial those defendants on bail or, more usually, on personal recognizance. Consequently, those released go their merry criminal ways until they get pinched again for another crime. One of the greatest causes of crime is letting known criminals loose upon the streets without bail or on small bail for months and sometimes years before we are able to reach them for trial . . .

New Bedford, in Massachusetts, is a high crime area. I was advised that most of the crime was being committed by people who were released awaiting trial on other indictments for crime. The summer was approaching. Rather than have these defenants on the loose all summer long, I assigned three special criminal sessions in May and June in New Bedford to try not the defendants who were in jail but the defendants who were on the street on bail. The court did just that. The police chief of New Bedford reported to me that muggings, robberies, breaking and entering, and rapes decreased by 40%. If that teaches one lesson, that lesson is that criminals have to be afforded a speedy trial, and if found guilty punished. This is not an isolated instance. I recently reviewed the criminal trial list for the month of June in the First Criminal Assignment Session in Suffolk County, which is Boston. To give you specifics, we had:

a. A defendant with 15 arrests as a juvenile was before the court in June for a current trial. His record disclosed that before he was reached for trial on the current indictment he had committed three previous larcenies, on three separate occasions, in three different courts and had been sentenced and appealed on all of them. The point is that while awaiting trial in the Superior Court on one indictment and on bail he had committed three additional offenses.

b. A defendant was upon the June list for trial on the crime of larceny, and his record disclosed that beginning in October, 1974, and while on bail, he had committed three additional, separate larcenies, had been found guilty, sentenced to two years, and appealed and on bail, and again committed three additional crimes while awaiting trial on a current indictment. He is still on the streets.

c. A defendant before the court for trial on an indictment for rape and related sexual crimes had a record of 12 prior arrests. While on bail awaiting trial for the rape indictment, he was arrested on two separate occasions for two separate rapes and kidnapping and an armed robbery. None of these cases has yet been tried.

d. A defendant was arrested on August 5, 1974 for armed robbery and released on bail. On August 12 he was arrested for receiving stolen property and again bailed. While these cases were pending before the grand jury and while he was awaiting trial, he was again indicted for two murders in the first degree, assault with intent to rape, and armed robbery. Before these cases could be tried, he was again indicted for two new offenses of armed robbery, assault with intent to rape while armed, and assault and battery by means of a dangerous weapon. None of these cases has yet come to trial.

These are typical examples of crimes committed while on the street and awaiting trial. Any criminal list will demonstrate to any sitting judge that there are repeated offenses committed by defendants released on bail or personal recognizance while the court is unable to reach them for trial on current indictments. I knew that the Bail Reform Law of 1971 was too liberal. In the courtroom I could see defaults by the bushel. I gathered statistics. These figures represent the defaults in the major counties of the Commonwealth for the three years prior to the enactment of the Bail Reform Law and for the three years subsequent to the passage of the Bail Reform Law. Without bothering you with detailed statistics, let me indicate that in Suffolk County defaults increased six times after the passage of the new bail law; in Middlesex County, they increased three times; in Essex County, they increased 17 times; in Worcester County, they tripled; in Hampshire County, they increased five times; and in the balance of the 14 counties of the Commonwealth, they tripled at least. When a defendant defaults, if you think he is immediately picked up and brought to court you are wrong. Without much criticism, because the police really have enough to do to keep up with current crime in the streets, the default warrant is usually placed in a pigeonhole in a desk at police headquarters. The next time we see the defendant is when we are lucky enough, and he is unlucky enough, to be picked up for another crime.

With this record, you would think that intelligent people would tighten up the bail laws. Not on your life! There is a new bail law flying through the Legislature which puts our present bail law to shame. It not only preserves the presumption that the defendant is entitled to be put on the street on personal recognizance, but it provides for a 5% deposit in cash on whatever bail is set. If a judge wanted to set honest-to-God bail of $50,000, he would have to set bail at $1 million. In addition to that, before a court can place bail, as we used to understand bail, he has to consider releasing the defendant in the custody of a friend or relative or place restrictions on his travel, his associates, or his place or abode. In other words, tell the defendant to be in at 10 o'clock at night or take his driver's license away from him. Under our new bail law, we do away completely with surety companies, and many times they were the only ones who had any interest in trying to find a defendant who had skipped . . . .

August 6, 1981

AUG [illegible]

The Honorable Strom Thurman
United States Senator
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

Dear Senator Thurman:

I write to recommend amendment of Title 18, United States Code, Section 3148 (Attachment A). The law, as presently drafted, allows convicted criminals to remain free in society pending appeal. Once a criminal defendant has been convicted after a fair trial under our system of justice with all its numerous safeguards, the public justifiably expects punishment to commence. To allow convicted criminals to remain at large after conviction and sentencing breeds public disrespect for the law and our legal system. Title 18, United States Code, Section 3148, should be amended to prohibit the release of any convicted criminal with the exception of those cases where the court makes an express finding that there are reasonable grounds to believe that the conviction may be set aside on appeal.

Present Law

Title 18, United States Code, Section 3148, reads in pertinent part:

> § 3148. Release in capital cases or after conviction.
> A person (1) who is charged with an offense punishable by death or (2) who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered... (Emphasis added).

Title 18, United States Code, Section 3146 (Attachment B), referred to by Section 3148 above, reads in pertinent part:

> § 3146. Release in non-capital cases prior to trial.
> (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount

> specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required... (Emphasis added).

Presently, persons convicted of federal crimes are released under the provisions of Section 3148, which merely refers back to Section 3146 governing pre-trial release. A federal judge must release the convicted criminal because Section 3146 directs that the judge "shall" order a release unless the judge can determine that the person will not appear in court.

Proposed Amendment

I propose that Title 18, United States Code, Section 3148, be amended to include the following language:

> A person who has been convicted of any offense for which he has or may suffer a sentence of imprisonment shall not be released on bail or his own recognizance unless it is established that there are reasonable grounds to believe that the conviction may be set aside on a motion for a new trial, or a motion for arrest of judgment, or reversed on appeal. For the purpose of this statute, conviction shall be deemed to occur at the time of rendition of a verdict of guilty by jury or court, or upon a plea of guilty or nolo contendere. After conviction, the court may allow a defendant to remain released on bail or his own recognizance until time of sentencing only with the agreement of the United States Attorney or his authorized representative. If release is granted under the provisions of this statute, and thereafter the defendant fails to prosecute his appeal diligently, or the court finds there is probable cause to believe the defendant committed a criminal offense during the period of release, the court shall revoke release.
>
> Factual issues relating to release shall be determined by a preponderance of the evidence. The prosecutor shall bear the burden of establishing factual issues under section 3146 (pre-conviction), the defendant under section 3148 (post-conviction).
>
> NOTE: Similar post-conviction release provisions have worked successfully in Arizona and other states. See Arizona Rules of Criminal Procedure, Rule 7.2 (Attachment C).

Reason for Proposed Amendment

Congress intended to treat indigent defendants more equitably by passing the Federal Bail Reform Act, 18 U.S.C. § 3146, *et seq.* Since defendants are presumed innocent until they are proved guilty beyond a reasonable doubt, the Bail Reform Act directed that defendants not be incarcerated before trial unless there was evidence that they would not appear for trial if released. The Act sought to prevent indigent defendants unable to post bond from being punished by pre-trial incarceration when they were presumed innocent in the eyes of the law. The wealthy, able to post bond, were released pre-trial. The Bail Reform Act attempted to solve an equal protection problem which had existed in the pre-trial situation where all men are presumed innocent.

The Act did not differentiate substantially between convicted and unconvicted defendants. After conviction by either a plea or a guilty verdict by court or jury, the situation changes drastically. The defendant then stands convicted, having been proven guilty beyond a reasonable doubt. The vast majority of convicted defendants appeal, making them eligible for the same permissive, pre-trial release provisions of Section 3146. Sometimes appeals drag on for months or years. This wholesale release of the convicted causes skepticism by the public and the victims of crimes who see the guilty remain free. Judges' hands are tied because, under the present law, they *must* release convicted defendants as long as there is no reason to believe they will not appear or are a danger to the community. In most cases, it is extremely difficult for the prosecutor to prove the defendant will not show up for trial or that he will commit another crime, so the defendant must be released. Judges often release convicted drug dealers and persons convicted of committing large-scale frauds against the public. Persons convicted of committing victimless crimes and property crimes are often not considered a danger to the community, as are perpetrators of crimes against the person.

In federal court, sentencing usually occurs one to four weeks after a guilty plea or verdict. Some defendants are placed on probation at the time of sentencing after the court has reviewed the pre-sentence report prepared by the probation department. Under the proposed amendment, all defendants would be required to be incarcerated immediately upon conviction until sentencing even if they are then granted probation. It is submitted that one to four weeks of jail time is beneficial as a deterrent, as it provides the defendant placed on probation a brief taste of jail which encourages him to avoid violating the conditions of probation. With the widespread use of summonses in federal court, many criminal defendants presently go through the federal criminal justice system from indictment to conviction, receive probation, and never see the inside of a jail. This situation hardly provides a general deterrent to crime, and is partially responsible for defendants who do not take probation seriously and who violate the terms of their probation.

Our criminal justice system will only reduce the rapidly rising crime rate if those convicted in our courts receive swift and certain punishment. Title 18, United States Code, Section 3148, as presently worded, frustrates this objective. By amending Section 3148, criminals will begin serving the time they have earned immediately upon conviction; deterrence will be promoted by decreasing the interval between crime and punishment; and public respect for the law will improve.

I am writing as an individual citizen with seven years experience as a prosecutor at the state and federal level, and not as a spokesman, representative, or official of the Department of Justice.

Respectfully,

Truman Young

Truman R. Young, Jr.
1040 East Driftwood Drive
Tempe, Arizona 85283

### § 3148. Release in capital cases or after conviction

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided*, That other rights to judicial review of conditions of release or orders of detention shall not be affected. As amended Pub.L. 91–452, Title X, § 1002, Oct. 15, 1970, 84 Stat. 952.

**1970 Amendment.** Pub.L. 91–452 added "or sentence review under section 3576 of this title" following "awaiting sentence".

*Legislative History.* For legislative history and purpose of Pub.L. 91–452, see 1970 U.S.Code Cong. and Adm.News, p. 4007.

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**1. Nature of right**

A defendant who has been found guilty by a jury and sentenced is not necessarily entitled to bail pending appeal as a matter of law. U. S. v. Bright, C.A.Tex. 1976, 541 F.2d 471, rehearing denied 544 F.2d 518, certiorari denied 97 S.Ct. 1560, 430 U.S. 935, 51 L.Ed.2d 780.

There is no right to bail after conviction. U. S. v. Bynum, D.C.N.Y.1972, 344 F.Supp. 647.

**2. Discretion of court**

Question whether a convicted person should be released on bail pending appeal rests in sound discretion of trial court. U. S. v. Baca, C.A.N.M.1971, 444 F.2d 1292, certiorari denied 92 S.Ct. 347, 404 U.S. 979, 30 L.Ed.2d 294.

Bail after convicton and pending appeal is discretionary. Bloss v. People of State of Mich., C.A.Mich.1970, 421 F.2d 903.

Under statutory guidlines imposed by Congress, it is duty of Court of Appeals, if possible, to set conditions under which defendant might be released pending appeal. U. S. v. Harrison, 1968, 405 F.2d 355, 131 U.S.App.D.C. 390.

Determination of whether to grant bail pending appeal is committed to trial court's discretion. U. S. v. Miranda, D.C.Fla.1977, 442 F.Supp. 786.

Although sections 3146-3152 of this title makes bail mandatory in noncapital cases prior to trial, it is discretionary with the court subsequent to conviction. U. S. v. Hearst, D.C.Cal.1976, 424 F.Supp. 318.

There is no right to bail after conviction; question whether a convicted defendant is to be released on bail pending appeal rests in sound discretion of trial court. U. S. v. Quicksey, D.C.W.Va.1974, 371 F.Supp. 561.

Grant or denial of bail pending appeal is matter of discretion to be exercised by judge upon record. Sims v. Wainwright, D.C.Fla.1969, 307 F.Supp. 116.

State courts did not abuse their discretion in denying bail pending appeal to defendant found guilty of assault with intent to commit rape and sentenced to 14 years and 7 months' imprisonment. Id.

Federal district court has authority to grant bail upon motion for habeas corpus but convicted felon has no absolute right to bail pending appeal. Id.

Court is authorized to order defendant be detained without bond pending appeal. U. S. v. Jackson, D.C.Conn.1969, 297 F.Supp. 601

**2a. Jurisdiction**

District court which had convicted defendant of extortionate extensions of credit did not lack jurisdiction to enter initial order temporarily revoking defendant's appeal bond on theory that, once appeal had been filed, trial court was without jurisdiction during pendency of such appeal to enter orders in the case. U. S. v. Bowdach, C.A.Fla.1977, 561 F.2d 1160, rehearing denied 565 F.2d 163.

Filing of notice of appeal, though transferring jurisdiction over case from district court to Court of Appeals, does not render district judge powerless or without jurisdiction to enforce the conditions of a bond under which defendant has been released pending appeal; the district court retains jurisdiction over the person of the defendant at least for the limited purposes of reviewing, altering or amending the conditions of release, and is empowered to revoke or forfeit defendant's bond during the pendency of an appeal for any of the reasons which would have supported an initial denial of application for relief. U. S. v. Black, C.A.Ind. 1976, 543 F.2d 35.

**3. Offenses within section**

Substantial drug trafficking is itself a sufficient danger to the community to justify denying bond pending appeal to a defendant found guilty of being a dealer in drugs. U. S. v. Miranda, D.C.Fla.1977, 442 F.Supp. 786.

Where defendant was convicted of importing 23 tons of marijuana into the United States and of unlawful possession of a firearm, where evidence was extremely unfavorable to the defendant, and where evidence, including fact of prior flight and fact that defendant trafficked in drugs, indicated that defendant would be a danger to the community upon release, defendant's petition to be released on bond pending appeal of conviction would be denied. Id.

**3a. Nature of actions**

When an action pending in a United States court seeks release from what is

**Cross References**

Jurisdiction of Supreme Court to review state court judgments or decrees, see section 1257 of Title 28, Judiciary and Judicial Procedure.

**Library References**

| | |
|---|---|
| Bail ⟹44. | C.J.S. Bail § 33 et seq. |

**Notes of Decisions**

**1. Release of defendant**

United States Supreme Court could not have admitted to bail, before expiration of his New York sentence, person convicted in New York of unlawful possession of heroin, where offense was not bailable. Sibron v. State of N. Y., N.Y.1968, 88 S.Ct. 1889, 392 U.S. 40, 20 L.Ed.2d 917.

A plaintiff in error, chargeable with an offense bailable by the laws of the state, shall not be released until final judgment or until a bond shall be given. Hudson v. Parker, Ark.1895, 15 S.Ct. 450, 156 U.S. 277, 39 L.Ed. 424.

## § 3145. Parties and witnesses—(Rule)

*SEE FEDERAL RULES OF CRIMINAL PROCEDURE*

On Preliminary Examination, Rule 5(b).
Before conviction; amount; sureties; forfeiture; exoneration, Rule 46.
Pending sentence, Rule 32(a).
Pending appeal or certiorari, Rules 38(b), (c), 39(a), 46(a, 2).[1]
Witness, Rule 46.

June 25, 1948, c. 645, 62 Stat. 821.

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[1] Rules 38(b), (c), 39(a), abrogated, Dec. 4, 1967, eff. July 1, 1968. See Federal Rules of Appellate Procedure, 28 U.S.C.A.

## § 3146. Release in noncapital cases prior to trial

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash

or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: *Provided*, That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

Added Pub.L. 89–465, § 3(a), June 22, 1966, 80 Stat. 214.

### Historical Note

**Codification.** A prior section 3146, Act Aug. 20, 1954, c. 772, § 1, 68 Stat. 747, which prescribed penalties for jumping bail, was eliminated by Pub.L. 89-465, § 3(a), June 22, 1966, 80 Stat. 214, and is now covered by sections 3150 and 3151 of this title.

**Effective Date.** Section 6 of Pub.L. 89-465 provided that: "This Act [enacting this section and sections 3147-3152 of this title, amending sections 3041, 3141-3143 and 3568 of this title, and enacting provisions set out as a note under this section] shall take effect ninety days after the date on which it is enacted [June 22, 1966]: *Provided*, That the provisions of section 4 [amending section 3568 of this title] shall be applicable only to sentences imposed on or after the effective date."

**Short Title.** Section 1 of Pub.L. 89-465 provided: "That this Act [enacting this section and sections 3147-3152 of this title, amending sections 3041, 3141-3143 and 3568 of this title, and enacting provisions set out as a note under this section] may be cited as the 'Bail Reform Act of 1966'."

**Purpose of Bail Reform Act of 1966.** Section 2 of Pub.L. 89-465 provided that: "The purpose of this Act [enacting this section and sections 3147-3152 of this title, amending sections 3041, 3141-3143 and 3568 of this title and enacting provisions set out as a note under this section] is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."

**Legislative History.** For legislative history and purpose of Pub.L. 89-465, see 1966 U.S.Code Cong. and Adm.News, p. 2293.

### Library References

Bail ⇨42, 50.

C.J.S. Bail §§ 33 et seq., 50.

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**1. Construction**

Contentions relating to various practical considerations flowing from court's interpretation of this section to require review by judicial officer of conditions imposed for defendant's release prior to motion addressed to district court were more appropriately to be considered by Congress than court. Grimes v. U. S., C.A.D.C.1967, 394 F.2d 933.

Clarity of provisions of this section and section 3147 of this title concerning review of conditions imposed by judicial officer on release of one detained on felony charge prior to indictment eliminated necessity for resorting to examination of legislative history of the act. Shackleford v. U. S., 1967, 383 F.2d 212, 127 U.S.App.D.C. 285.

**2. —— With other laws**

The Bail Reform Act of 1966, sections 3146-3152 of this title, and the District of Columbia Bail Agency Act must be read

## Rule 7.2 Right to release

**a. Before Conviction.** Any person charged with an offense bailable as a matter of right shall be released pending or during trial on his own recognizance, unless the court determines, in its discretion, that such a release will not reasonably assure his appearance as required. If such a determination is made, the court may impose the least onerous condition or conditions contained in Rule 7.3(b) which will reasonably assure his appearance.

**b. After Conviction.** After a person has been convicted of any offense for which he has or may suffer a sentence of imprisonment, he shall not be released on bail or on his own recognizance unless it is established that there are reasonable grounds to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding. The release of a person pending appeal shall be revoked if he fails to prosecute his appeal diligently.

**c. Burden of Proof.** Issues under Rules 7.2(a) and (b) shall be determined by the preponderance of the evidence. The prosecutor shall bear the burden of establishing factual issues under Rule 7.2 (a), the defendant under Rule 7.2(b).

### Comment

**Rule 7.2(a).** This section establishes a presumption for release on recognizance in most cases. Offenses "bailable as a matter of right" are defined in Ariz.Const. art. 2 § 22 and Ariz. Rev.Stat.Ann. § 13-1571 (1956) as all cases except "capital offenses when the proof is evident or the presumption great" and felonies committed while on bail (using the same "proof is evident or the presumption great" standard).

The presumption of an "own recognizance release" follows closely the ABA, Standards Relating to Pretrial Release, § 5.1 (Approved Draft, 1968), and the Federal Bail Reform Act, 18 U.S.C.A. § 3146 (1966). This section of the rule differs only in emphasis from Ariz.Rev.Stat.Ann. § 13-1577(B).

**Rule 7.2(b).** See Rule 17, Rules of the Supreme Court, 17 Ariz.Rev.Stat.Ann.

### Historical Note

**Derivation:**

1956 Rules of Criminal Procedure, Rules 41, 44, 158, 159, 301, 356, 357.

Rules Cr.Proc. §§ 70, 73, 197, 198, 319, 429, 430.

§ 981, P.C.'01.

§ 1099, P.C.'13.

§ 5072, R.C.'28.

44-411, 44-414, 44-807, 44-808, 44-1929, 44-2518, 44-2519, C.'39.

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November 28, 1981

The Honorable Senator Orrin G. Hatch
Room 125
Russell Senate Office Bldg.
Washington, D. C. 20510

Dear Senator Hatch:

It is my understanding that the Senate Judiciary Committee, of which you are a member, is considering a bill to eliminate Surety Bonding Agents in the Federal Courts. Apparently this bill ties in with the tightening up of criminal laws to try and halt the rapidly rising incidents of crime.

The Constitution provides that a defendant may make his bond or have someone make it for him. To deny the defendant the right to use a Surety Bondsman to make his bond for him would appear to be a violation of his constitutional rights.

Bail Bondsmen are the whipping boys of the judicial system. Whenever the judicial system appears to be unable to do its job properly, the hue and cry is that it is all the fault of the Bondsmen. The truth of the matter is that the fault lies within the judicial system itself rather than the Bonding Agents. The Constitution gives the man the right to make bond; the Courts fix the amount of the bond and the Bondsman posts the bond if the man cannot post for himself and he has the capability of paying the Bondsman for his services. Since 1967, in the State of Ohio particularily, when the personal recognizance statute was passed, and since 1976 when the Supreme Court wrote the new rules of Criminal Procedure in the Courts of Ohio and usurped the powers of the legislature to include the 10% rule, Surety Bondsmen have been writing only about 15% of all the bonds written. The Courts have been collecting the 10% in cases where defendants do not appear, and closing out the cases on the forfeitures and dismissing the cases. This, of course, does not effect the purposes of justice. The victims are defrauded and the State is defrauded out of the balance of the bond on which the 10% was based.

I am enclosing a copy of a speech I made before the Rotary Club in Wilmington, Ohio and a copy of a rebuttal that I wrote to the Cleveland Plain Dealer in answer to charges against Surety Bondsmen that they made in August of 1980 in 18 pages in 13 days of publication. I sent the rebuttal to several judges in the Common Pleas Court of Cuyahoga County, Ohio. They followed some of my recommendations and as a result they have no further problems in the Courts. May I suggest that you read these articles prior to enacting any legislation to eliminate the Bondsmen, and rather than eliminate the Bondsmen, let the Courts sweep off their own doorsteps and recognize the Sureties as the ex-officio officers of the Court that they are and allow the Sureties to assist the Courts.

If Surety Bondsmen are eliminated in the Federal Courts it is only reasonable to assume that the State Courts will follow suit and eliminate Surety Bondsmen in the lower Courts and thus violate the rights of the defendants as provided them in the Constitution. In my 30 years as a Surety Agent, I have noted the tremendous change in the attitudes of people concerning Bonding Agents when they find themselves in the need of such services.

Respectfully submitted,

Clyde W. White
Clyde W. White

Enc. 2

## BAIL BONDS

INTRODUCTION:

Good afternoon, ladies and gentlemen, or Rotary Club persons, if you are going by the trend of the times. I am pinch hitting for my friend and contemporary, Dan Ristenburg, who is unable to be here due to illness. I have been asked to speak to you today on the facet of the Criminal Justice System that is probably the most talked about by politicians seeking to find a solution to the continuously rising crime rate in the nation; by people who run afoul of the law, judges and prosecutors, law enforcements agencies, and the least understood by any of these people. There is no course in Law School to speak of, on the subject. Police and/or Law Enforcement schools do not teach the subject. No seminars are held to try and educate the public as to the purpose and administrative procedures that are involved. Yet it is a matter of grave concern for the Courts. Lawyers come face to face with it daily. It is a matter that effects the lives and property of each and every person that comes before a court of the criminal justice system in these United States and yes, wherever free men live in the world. Millions of dollars are involved daily. The phase of the judicial process is a right guaranteed by the 8th Amendment to the Constitution of the United States of America and the Constitution of the State of Ohio. It is a subject that has been widely televised in recent months. It is the object of a special hearing by the Senate Judiciary Committee at the present time. Our Ohio Senator, Howard Metzenbaum, is a member of that committee. As the renowned comedian, Jimmie Durante was want to say..."Everybody wants to get in the act". You will find suggestions for reform in the platforms of Democrats, Repulicans, independents, Socialists, utopian thinking minders of other peoples affairs, bleeding hearts, the clergy and civil rights and minority groups. The individuals, for whose benefit the right has been established, know it is their right...but don't understand it. Judges abuse it; Clerks of Court, who are charged with its administration, by the statues which created their office, are not aware of their administrative duties and powers of enforcement. Nor are they aware of the extent to which they can be held accountable if they are negligent in their duties.

Other than defendants before the courts in criminal action, those of us most closely connected to this phase of the judicial process, are portrayed in movies, in television and by certain newspapers, social reform groups and politicians as being sleazy type characters, in slouch fedora hats, wearing expensive clothing, with jewelry bedecked hands and driving huge limousine type cars; having close ties to the underworld giving and taking bribes, and yes, even being a part of the criminal element and generally being people unfit to associate with true and upright men.

It sounds like something ostentanious and at the same time, dark and foreboding doesn't it? For all of the foregoing, what I want to talk to you about is really quite simple - it is Bail Bonds and Surety Agents or as we are more commonly known "Bondsmen".

The subject of bail is like a grapefruit. There is more to it than meets the eye. It is a phase of the Judical Process that should be required teaching in law schools, police academies and also to public officials concerned with its administration. It should be a subject of seminars in "continuing education" process for those who are required by law to keep themselves updated.

The first incident of bail to the best of my knowledge can be found in the chapters of the New Testament that relate the story of St. Paul. He was captured by the Romans and then allowed to go about his affairs for a year. He was then required to return to Rome and stand trial. This he did and was tried, convicted and beheaded. We next find historical references to bail where by a Surety in order to secure the pretrial release of an accused person, offered to stand in his stead and be tried as the accused, if the person did not show before the courts at the appointed time and place of his trial. In the centuries that followed,England was governed by Kings, The law of the Land was under the Feudal System. It was not uncommon for the Kings to demand that his Lords, Earls and Knights.put their sons in bondage to him to insure the loyalty and obedience of his vassels, when the barons villiens came to the attention of the law, the barons would pledge their property to insure the defendants sppearance before the courts. When King John of England, who ruled England in the early 13th century became abusive of his powers and disregarded the legal rights of his subjects, the Feudal Barons united together and under the guidance of Stephan Langton, Bishop of Canterbury, drew up a document and forced the King to sign it. That document was known as the Magna Carta. The articles of the Magna Carta were known as chapters. Chapter 39 guaranteed an English citizen the right to Bail and permitted him to either make his own bail or have someone do it for him. Bail, then, while it may take various forms, is a pledge of property or money to secure the release of an accused person, temporarily, from custody until the appointed time of the trial of the accused. The bail guarantees that the accused will appear in person when he is called by the Court. To forfeit, whatever is deposited, is the penalty to the surety if the accused fails to appear. The Surety is the person who makes the deposit for the accused.

Although the Magna Carta was revised many times after King John signed it first on Friday, June 19, 1213 and the time of the settlement of the American colonies in the eighteenth century, the right to bail was never changed.

The framers of the constitution carried on the right to bail. The 8th amendment states that "excessive bail shall not be required". Bail shall not be used for punishment. Our system of justice is founded on the judicial principle that everyone is innocent until proven guilty. The various states incorporated the right to bail in their constitutions. Article 17 of the Ohio Criminal Code of the constitution guarantees the right of the defendant to furnish bail for himself or to have someone do it for him. It provides that bail shall not be excessive nor can it be used as punishment. The legislators of the State of Ohio have enacted statutes making provisions for bail. They can be found in Section 2937.01 thru 2937.44 and in supplemental sections. Section 2937.02 makes it mandatory that the officer having custody of a prisoner make available to him a method whereby he can make arrangements for counsel or bail. Section 2937.22 sets forth the forms of bail that the accused may make. Section (A) states he may deposit cash or have someone do it for him. (b) he may deposit, or have someone do it for him, bonds of the United States, or any state or political subdivision. (c) the written undertaking of one or more persons to forfeit the sum of money set by the court or magistrate if the accused is in default for his appearance. Section 2937.38 and Section 2937.281 provides that the accused may put up property owned by him or one or more residents of the county of jurisdiction. The owners equity in the property must be twice the amount of the bond and the property must be located in the court of jurisdiction.

The 1967-68 session of the General Assembly enacted a statute giving the accused the right to sign a "Personal Recognizance Bond". This statue gives the accused the right, at the descretion of the Court, to merely sign his name to a recognizance where he promises he will appear under penalty of a $5000.00 fine and one year imprisonment, if he fails to appear. This is found under Section 2937.29 of the Revised Code.

Please note that the Statutes of the State of Ohio do not include the 10% Rule as a form of bond that can be accepted by the Courts. I will discuss this form of bond in more detail a little later.

Now we come to Sureties - Bonding Agents or as we are more commonly known "Bail Bondsmen". The Ohio Criminal Code provides that the purpose of a Bail Bond is to insure the appearance of the accused before the Court at the appointed time and place. A Bail Bond has No Other Purpose than that. The Constitutional right of the accused to make his bail or "have someone make it for him" gave rise tothe Surety Bond business and the"Bondsman". Corporate Insurance Companies put up their assets to guarantee such bonds and hired Insurance Agents to post the bonds, collect the premiums and chase the "skips". I am a bond agent and I have been in the Bonding business for just a tad over 30 years. I have made a very thorough study of the laws that deal with Bail. I have written articles on the subject, and I like to think that I know whereof I speak. The Corporate Surety Bail Bond is no different than a bond for any other purpose, in any other type of business. If you sign a note for another, endorse a Mortgage, if you guarantee your products and services, you are every bit as much of a surety as a Bail Bondsman, to the extent of the limits of your undertaking. If you cosign a note, you are as liable as the principal signer. (I am sure that none of you would ever do such a thing. My Father always told me that I had a couple of things that I should be very careful of where I put them. One of them was my Name.) I guess I didn't pay enough attention to his advise, did I?

A Surety Bondsman has additional obligations. The defendant, even though has has been released on bond, is still under the jurisdiction of the Court. The only difference being that he is now under the care, control and custody of his surety, as opposed to being locked up in jail under the care control and custody of the Sheriff or detention officer, charged with his custody. In the U.S. Code Annotated, Title 18, Crimes and Criminal Procedure, at page, Exparte Salinger, C.C.N.Y. 1923, 288F752. U.S. vs Schneiderman D.C. Cal. 1951, 102 F. Supp. 52 Page 12 of 1958 Supp. Lingerfelt, 109 N.C. 775, 14 S.E. 75:

> "The books have clearly expressed this idea in regards to the relationship of the principal to his bail, and the authorities are pretty well agreed upon it. A man's bail are looked upon as his jailors of his choosing, and the person bailed is, in the eyes of the law, for all intents and purposes deemed to be as much in the prison of the Court by which he was bailed as if he were in the actual custody of the proper jailor": (2Hawk, P.C. 140).
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> "It is sufficient to say * * * * * that in the immemorial legal theory the petitioner never was discharged from custody. The giving of the recognizance by him only operated to transfer the custody of his person from the sheriff to his sureties. Henceforth, they, instead of the sheriff, were his jailors. There was, therefore, no occasion for the issuance and service of a new order of arrest nor for a warrant of committment.

Thus we find the Surety to be an Ex-Officio Officer of the Court.

In addition to all the other

things people call him, he is a Jailor. The County Sheriff or any other law enforcement officer, charged with the custody of a defendant, must present his body before the Court at the time and place designated by the court. The Law Enforcement Officers make certain of his appearance by locking him up in the County or City jail. The tax payer must pay for his food, lodging, clothing, provide medical services when necessary and the tax payer may be called upon to provide for the family of the accused thru welfare or other social services, if his detention is of sufficient duration as to preclude his doing these things for himself. The other penalty he suffers is the loss of his freedom to come and go as he pleases. If the Surety becomes his jailor, by his choice, he is permitted to go free, and is no longer completely restrained. The court may, in order to further insure his appearance, impose conditions or restrictions on his release or bail. Such as denying him the right to leave the County of jurisdiction or other geographical restrictions. The surety may impose any restrictions he deems necessary, as a condition of his posting the bond. The surety has the same legal obligation to present the defendant before the court, as does the law enforcement officer, charged with his custody. A bail bond is a private contract between the bail and his surety. The court has no concern in this matter of the private contract, no is it any of the courts business as to the premium charge nor the method of payment of the premium. The law is clear in this respect.

The concern of the court lies with the Clerk of Court, who is designated by the statute which created the office, as the administrator of the Bail System, is the Surety's ability to pay if and when a forfeiture is adjudicated against him. The Statutes impose upon the Clerk of Court, not the Judge, the responsibility of qualifying the surety, as to their capabilities and reliability. Many Judges have usurped the authority of the Clerk of Court and have taken this authority unto themselves. This results in a breakdown of the bail system. The Clerk of Court can be held pecuniarily liable if he does not collect his forfeitures, if and when the defendant defaults and fails to appear as required, and the court declares the bond forfeit. Judges, without any statutory authority to do so, continue to state the nature of the bond a defendant may post for his release. For example: "Cash Only", "May sign his own recognizance", "May sign a 10% Bond" or "Cash or Surety". Thus the Clerk of Court finds himself in jepordy of paying the penalty of the bond he accepts. Surety Companies must post a reserve with the Supt. of Insurance of Ohio in the form of cash or negotiable securities, to insure their ability to pay forfeitures when they are called. The Surety's Agent must post a Certificae of Compliance with the Clerk of Court to guarantee the Company is authorized to do business in the State and that they have complied with Ohio Insurance Laws. If the Surety doesn't pay, the Clerk has recourse to his assets through the Supt. of Insurance. Cash Bondsrequire no additional collateral. If the court forfeits the bond, the Clerk keeps the cash. If the court says that the defendant may sign a Personal Recognizance Bond, and the defendant fails to appear, Law Enforcement agencies must hunt him down again..at the taxpayers expense. The Statutes provide for a penalty of a one year imprisonment term and a $5000.00 fine for failure to appear on this type of recognizance. This law has been in effect since the 1967-68 session of the General Assembly. Although there have been countless thousands that have failed to appear, I have not heard of nor do I know of any instance where the law has been invoked, when the defendant has been returned to the court. This brings us to the 10% Rule which I said I would discuss. It is also known as Rule 46 (c) of the Rules of Court for the State of Ohio. These are court procedural rules that govern court procedures. In this procedure the court fixes a bond in a specified amount. Let's say $5000.00. The defendant is required to deposit 10% or $500.00 in our case, with the court. He is promised that if he appears he will get back 90% of his deposit. He posts the amount and walks away. Some Clerks of Court do their jobs properly, or nearly so, and require the defendant to sign a Bond for the remaining $4500.00. If the defendant fails to appear, the court keeps the deposit and in most cases, closes the case. I personally know of a judge who explained to a Deputy Sheriff that that is they way he does it. I maintain that justice is thwarted and mocked. The defendant is free, unless he just happens to be picked up again. Then the case may be reopened and tried. Even though the court had declared the entire bond forfeit, the Clerk of Court has no way of collecting the balance of his forfeiture. He has no record of the defendants assests on which he may levy and foreclose and collect the money. He doesn't know where to find the defendant, even if he has such records, so how can he collect? So in addition to justice being mocked, the people of the State of Ohio have been cheated out of $4500.00 and they must also bear the expense of recapture and transportation to the Court of Jurisdiction.

If the defendant appears in Court, he gets 90% of his deposit returned to him. Big Deal. Section 2937.41 of the Code orders the Clerk of Court or the Magistrate to return the cash deposits to the depositor when the terms of the recognizance have been satisfied. It does not say "...shall return 90% or 80%". It says "...Shall return the Cash Deposit to the depositor". Furthermore, there is no statutory provision for the disposition of the 10% of the deposit that the Court keeps. I make a public charge here and now that the "10% Rule" is a Fraud, a

Delusion, that it is unconstitutional and illegally administered. This procedure was designed by the late Chief Justice of the Ohio Supreme Court, C. William O'Neil, to carry out his avowed purpose to "Eliminate Bail Bondsmen", and "To Put Them Out of Business". The General Assembly, in the 1967-68 session, refused to enact this into a statutory law. Chief Justice O'Neil said "to Hell with them...I will find a way to circumvent them". He did just that, by including the procedure into Rule 46 (c) of the Rules of Court with the notation that it was in conflict with the Statutes. Now we come to the question of Who Makes the Laws of Our Country? The Legislature, as provided for in the Constitution of the State, or the Judiciary branch of the Government that is charged with interpreting the Laws?

I see that my time is up. I have given you, I hope, some food for thought. I hope that you now have a better idea of what Bail Bonding is all about. How it originated, and it's purpose and part in the Criminal Justice System. I have touched lightly on the administrative facets as provided by law and the responsibilities of its administration. There is a lot more that I could talk about and would very much like to do so. There are some tales I could tell you that might be of some passing interest. Maybe some other time. In this connection I am reminded of a preacher that was called upon to supply a pulpit of a church where the congretation made it extremely difficult to keep a permanent pastor. This preacher spent a great deal of time in preparing his service. However, when he got to the church, the only person in attendance, besides the piano player, was a farmer. Since the preacher had spent so much time getting his sermon ready for this service, he decided to go ahead and preach the sermon as he had prepared it. He went through the entire Sunday service, singing the songs, taking up a collection, reading the announcements and giving the entire sermon. After the benediction and when he was at the back of the church after the service, the one poor members of the congregation that was in attendance went up to shake his hand. As the preacher shook his hand, he apologized to the man, but he said he had spent a week in preparing the sermon, and was determined to go through with it. Then he said, "You are a farmer, aren't you?" The man nodded his head yes. The preacher then asked. "If you had a wagonload of hay and hauled it down to the field to feed the cows, and if when you got there - only one cow showed up, wouldn't you still feed the cow?" The farmer pondered a moment, then said, "Yes, but I don't believe I would give her the whole load!"

In summary, we find that (1) Bail is a right guaranteed under the Federal and State Constitutions. (2) It has been in operation and practice for several thousand years. (3) At any time, anyone may find it necessary to invoke his right of

"Bail". (4) Bail is an intregal part of the Criminal Justice System. (5) Bail Bondsmen perform a necessary service to (a) the defendant, who has a right to the service,(b) to you as a taxpayer by saving you the costs of feeding, housing and maintaining the defendant and possibly his family, and furthermore, we save you the expense of hunting down and transporting errant defendants who attempt to flee from their justice. (6) Surety Bondsmen are ex-officio officers of the Court and perform an invaluable service to the Courts by working in conjunction with Law Enforcement Agencies. I believe that the Courts would further their purposes by recognizing us as such and let us work with them, rather than fighting us and trying to eliminate us. (7) There is nothing wrong with the Bond System. Simply tighten up its administration and everyone do his own job and above all, follow the law. It is there to cover every requirement. And it will work. (8) The Courts and not the Bondsmen are responsible for "Easy Bail" which they so loudly decry and attempt to fix the responsibility on the backs of the Bondsmen. (9) Real statistics will show that the incidence of crime is higher in areas where "Easy Bail" is available, such as Personal Recognizance and the 10% Rule. People who are inclined to break the law are more apt to do so where 10% of a ficticious bond is the price to pay for their misdeeds, or where a Personal Recognizance Bond is easily available and they suffer no costs. In the language of the street, such places are called "Easy Towns" and the word is passed along.

(10) In closing, I would like to say to the members of the U.S. Senate Judiciary Committee, that have a proposal before them to eliminate the Surety Bondsman in Federal Courts, that this is another attempt to take away a right that is guaranteed under the Constitution. The right of a person to "Make His Bail", or Have Someone Make it for Him". It is my considered opinion that it would serve the National Interest far better if they were to consider eliminating the "Easy Bail" programs.

Gentlemen, I think you for your attention and for the opportunity to present "Our Side". Neither I nor my collegues in the National Association of Bail Underwriters are the TYPES as we are portrayed by the movies. Thank you.

Clyde W. White
Clyde W. White
Bond Agent

## BAIL, SURETIES, BONDING AGENTS, JUDGES, COURT OFFICIALS, ADMINISTRATION REFORMS AND 10 PERCENT RULE

(By Clyde W. White)

Note.—This report is a rebuttal to the Cleveland Plain Dealer's August 1980 articles on the bail system.

I have read with some interest your headlined articles in the Plain Dealer of August 3rd thru the 13th wherein your Pall Mall award seeking reporters, Walt Bogdanich and Ronald Rutti, have attemped to portray all people engaged in the Bonding Business as slimy creatures that just crawled out of a cesspool. In the quest to achieve sensationalism, your reporters have attempted to show that the very fact that Bondsman do exist, is a violation of the law. You have given eighteen and one-half pages, with pictures, plus an editorial in 10 days to this campaign. I appeal to your sense of fair play to give me ample space for rebuttal in behalf of Bondsmen who operate their business in accordance with the law and have reason to resent the aspersions cast on their characters by your reporters. If I am going to be included in a public ass kicking—I want to be certain that the proper ones are being kicked.

In view of the fact that you have painted such an unsavory picture of the bail industry, perhaps we should begin by clearing up the picture and putting things in their proper perspective. The Bonding business is a legitimate industry. The Constitution guarantees everyone the right to bail. The Courts of the land recognize this fact and set bonds in the cases that come before them. Bonds may be posted in several ways, depending on the policy of the court which has been arrived at through their experiences in the use of the various methods, i.e. Personal Recognizance Bonds, where one signs his name and walks away; Property Bonds which involves pledging real estate wherein the equity must be twice the amount of the bond, and which must be located in the County of the jurisdiction of the Court; Cash in the full value of the penalty of the bond; or one may have a Surety Bond posted for him. This is where the Bondsmen comes in. He in effect borrows the full amount of the Bond from the agent who represents a Surety Company. The Surety Company has posted Collateral with the Division of Insurance in compliance with the Insurance Laws of the State of Ohio. The Agent is licensed to sell insurance by the State of Ohio. The Agent charges a premium for the use of the money. Banks and lending institutions also make a charge for lending money. They call it "interest." Typical bonds range from One Hundred Dollars to Twenty-five Thousand Dollars. They have been known to go as high as a million dollars. Witness the private citizen in California who put up his property as collateral for a two hundred-fifty thousand dollar bond, and lost it when his "victim" fled to Africa and the Middle East.

It is considered highly inadviseable for people to carry large amount of cash on their person or concealed in their automobiles. Law enforcement agencies, news media, and other concerned organizations, and minders of other peoples affairs, are constantly urging people not to carry large sums on their person, but to carry credit cards and other more personalized mediums of exchange and barter. As a result of these constant reminders very few people set forth carrying large sums with the idea in mind that they may need it before the day is over, if, by chance, they inadvertantly fall afoul of the law. However, suppose they find themselves in Sometown, U.S.A. during the early hours of the morning, and having spent the evening in fun, frolic, and revelry and having taken that last one for the road, they come to the attention of the local or State Police, who feel that their driving constitutes a hazard to the rest of the motoring public, and so haul them away to jail for safe keeping until they can be brought before the court to answer for their transgressions. At the jail they learn they have two choices. They can wait in jail until their court date or they may go free by merely posting a $1,000.00 to $5,000.00 Bond. Not having the required amount of cash on their person, and neither checks nor credit cards being acceptable, the first thing to do is "call my lawyer". Generally speaking, the lawyer, by law, is prohibited from posting bail for his client, he tells our friend to "call a bondsman". The Bondsman is called, he gets out of his warm bed, ventures forth into the night, irrespective of the weather conditions, and travels the distance to the jail—(I've gone as far as one hundred miles one way). He makes the necessary arrangements for his "victim" to pay him—fills out the necessary papers and returns the person to the sanctuary of his home and fireside and the endearing embrace of his loved ones. Then the Bondsman winds his weary way homeward, and probably repeats the process all over again. The "victim's" banker wouldn't do it for him; his attorney wouldn't do it for him; his preacher wouldn't do it for him; the newspaper reporters wouldn't do it for him. The Bondsman did do it for him. To the best of my knowledge, the bankers have made no comment for or against the Bondsman. The attorneys, according to the UPI Report in the Wooster Daily Record, want the Bondsman put out of business. The preacher feels the Bondsman should be eliminated because he takes money from the defendant for services honestly performed, and all defendants should be permitted to sign their own recognizances. The newspaper reporter tries to portray the bondsman as being underworld characters; that we all deal in bribes and pay offs—that we corrupt public officials; that we serve no useful purpose and that we are contaminated, unclean, and a segment of society that are parasites that live and get extremely rich off the misfortunes of others. Do we stand alone in this respect? What would newspaper people do if there was nothing to report but peace and love and granola meal in the world—no problems in industry; no problems among foreign nations; no racial problems; no bankruptcies, divorces, crimes, deaths, accidents, or disasters. I don't see any newspaper or news media people in breadlines. They seem to make a living searching out and writing and talking about the unfortunate things that happen to people in this world. What about the attorneys—if no one ever violated the law or if people did not get into disputes that result in litigation, or if people didn't die so that their estates had to be settled, we wouldn't need attorneys and judges, would we. Now preachers—if preachers were really following the teachings of Jesus Christ, they would pass on his teachings and live as he told his deciples to by going among the people who would see to their needs as to food, shelter, and clothing—Take away or even suggest reducing that preachers salary, as they have suggested denying bondsmen the right to their livelihood by elimination, and see how long it takes them to find other employment. Bondsmen are gouging the defendants! We post a one thousand dollar Bond on a felony charge and charge a one hundred dollar premium. An attorney takes his felony case and charges him fifteen hundred dollars; a five hundred dollar Bond for D.W.I.—we charge a premium of fifty dollars—the attorney will charge him five hundred dollars to represent him in Court. Mr. Reporter, we all may be scum in your eyes, but the person in the example mentioned above didn't think we were too contaminated or too unclean to shake our hand and thank us; nor to say "thank you so much for helping me" when he came in to pay for his bond or when he sent his check or money order. Nor did he or any one else consider themselves our "victim". The use of the word "victim" is inexcuseable and merits an apology. The defendant to whom a bondsman renders a service is no less a "victim" of the bondsman than is he a "victim" of an attorney, a banker who lends him money, an automobile dealer, a clothing merchant, or a grocer who sells him food. He is our "client". If anyone can be classified as a "victim", it is the honest and industrious business men who have been demeaned by your publication.

So much for the way the bonding business actually works. First let's see what the law says. Had your young reporters based their report upon a research of the law, rather than predicating statements upon remarks made by people who are trying to cover their own shortcomings, unfamiliar with the law concerning Sureties and bail bonds, whether or not they claim a legal background, you would have found the following in the United States Code Annotated, Title 18, Crimes and Criminal Procedures, Page 57, Exparte Salinger, C.C.N.Y. 1923, 288F752. U.S. vs Schneiderman D.C. Cal. 1951, 102 F. Supp. 52 Page 12 of 1958 Supp. Lingerfelt, 109 N.C. 775, 14 S.E. 75.

"The books have clearly expressed this idea in regards to the relationship of the principal to his bail, and the authorities are pretty well agreed upon it. A man's bail are looked upon as his jailors of his choosing, and the person bailed is, in the eyes of the law, for all intents and purposes deemed to be as much in the prison of the Court by which he was bailed as if he were in the actual custody of the proper jailor": (2 Hawk, P.C. 140).

"It is sufficient to say * * * that in the immemorial legal theory the petitioner never was discharged from custody. The giving of the recognizance by him only operated to transfer the custody of his person from the sheriff to his sureties. Henceforth, they, instead of the sheriff, were his jailors. *There was, therefore, no occasion for the issuance and service of a new order of arrest nor for a warrant of commitment.*"

"The doctrine is well settled that where bail is given, the principal is regarded as delivered to the custody of the sureties. Their dominion is a continuance of the original imprisonment". "The sureties are subrogated to all the right means which the state passes to make the control effective (Ct. Cr. app. Okla) 90 Pac. (2nd) 954, quoting Am. J. Vol. 6 page 12, Sec. 165) "The obligation of the bail in this class of cases is to produce the principal before the Court upon demand, and at any and all times surrender him in accordance with its mandates." Please note some very important points in the foregoing. (1) The Surety is the custodian of the accused who is still a prisoner of the Court: thus the surety is in fact an ex-officio officer of the Court. (2) The sole purpose of a bail bond is to assure the appearance of the defendant before the Court requiring his appearance at such time and place as required by the Court. (3) It is the obligation of the surety or custodian of the prisoner, whoever he may be, to see that his charge makes that required appearance. Please note with care that there are no qualifying phrases attached to these requirements such as "depending upon the nature and seriousness of the offenses with which the defendant is charged"—"unless the defendant has gone to another state to find employment"— "unless the defendant has just started a new job and doesn't want to take the time off"—the obligation is "The Surety will present the defendant before the Court". The law is clear in its wording and clear in its intent. It does not make any deviation for the amount of the bond that was posted. (The principle of "Diminimus Non-Curate-Lex" is not a tenatable defense for the surety, nor is it for the defendant.)

Thus the Virginia bondsman, whom you attempted to discredit and villify, defame, and slander in your sensationalistic headline of Wednesday, August 6, 1980, was carrying out the letter of the law both Federal and State. What did the Bondsman do that was wrong? You say he "beat up his client, and dragged him away for a minor debt". Let's see what the law says about it. "It is equally clear that in order to effectuate their right to relieve themselves from the responsibility of custody the sureties have a right to arrest their principal. This may be done in person or *by an agent and may be accompanied by such force as is reasonably necessary.* No new process is necessary (They don't need a new warrant). In effect the arrest amounts to no more than the taking into actual custody of one already under his dominion. The scope of the law as stated in Com. V. Breckett, 8 Pick. (Mass) 130 as follows: "By the common law the bail has the custody of the principal and may take him away at anytime and any place. The taking is not considered as the service of process, but as a continuation of the custody which had been, at the request of the principal, committed to bail. The principal may therefore be taken on Sunday; the dwelling house is no longer the castle of the principal, in which he may place himself to keep off the bail. *If the door should not be opened on demand at midnight the bail may break it down,* and take the principal from his bed if that measure should be necessary to enable the bail to take the principal". The Supreme Court, in the case of Taylor vs. Taentor? 36 Wall, 366 used the following language, which has been quoted in the decisions ever since; "(The Sureties) * * * whenever they choose to do so may seize him and deliver him up in their discharge; and if this cannot be done at once, they may imprison him until it can be done. They may pursue him into another state, may arrest him on the Sabbath, and if necessary may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the recapture by the sheriff of an escaping prisoner".

From reading your article it is quite evident that your poor mistreated, innocent victim, is a liar and a cheat. He fully intended to defraud his bondsman. He fled the jurisdiction of the Court, and the reach of his bondsman—or so he thought. He intended to absent himself permanently. By his own and his wife's admission, he was given every opportunity to voluntarily return and prove himself worthy of the trust the bondsman had placed in him. He didn't do it, nor had he any intentions of ever doing it. How do I know? Why am I so sure? I've been in the bail bonding business since September of 1950. I have bonded thousands of "victims" as you put it, from all walks of life for everything exepting child abuse (and I won't touch anyone who does that male or female). I've heard all the stories. I'll take thirty to forty-five minutes to fill out an application and I'll tell you more about my client after that period of time that any prison shrink can after working with him for three months. So anyway, the bondsman finally exercised his right to "pursue him into another state" and he further exercised his right to send his "agents". You say the "agents" lied to the fugitive to get him to open the door. You rather pointedly failed to mention that the fugitive lied with intent to defraud and deceive the surety in the first place. There is no monopoly in lying. Again knowing the type of man the agents were dealing with, I am certain he resisted their efforts to arrest him and start back to Virginia with him, You see, had he wanted to return willingly and had he done so, it would not have been necessary for the agents to come and get him. You say in the scuffle he got belted in the mouth and get blood on him. My, my, I've made bonds in forty-five courts in the Start of Ohio plus the Ohio Supreme Court, the Federal Court in Cleveland, and Akron, and Appellate Courts in three different districts. I've bailed defendants out of jail who looked as though they had been processed through a hammer mill. If a sheriff was attempting to escort a defendant from his jail to the court and that defendant resisted, I'm betting that he would arrive before the court, and it is conceivable that this appearance would be somewhat disleveled, his clothing a might rumpled, and depending on the extent and duration of his resistance, there might even be visable signs of the necessity of physical force having been applied. Anytime anyone resists arrest or attempts to flee from arresting officers, and it becomes necessary to physically restrain him, I do not think it unusal that he might find bumps, bruises, contusions, and minor lacerations upon his body as reminders and evidence of the impropriety and futility of his endeavor. More particularly so when each of his captors are twice his size. Quite frankly, I fail to see where the bondsman did anything wrong. He was completely within the law and was obeying the spirit and the letter of the law. On the contrary, the man for who your young reporters hearts bled so profusely and uselessly all over page one and page six-B of the Plain Dealer on Wednesday, August 6, 1980, was at all times, 100 percent in violation of the law. Maybe your law professor has the answer to that one.

Now for your story about the man who was out for six days on a $75,000.00 Bond for $6,300.00 or 8 percent. First of all let me start you off on the right track. A bond contract entered into between a principal and a Surety is a Private Contract. The court has absolutely nothing to do with the terms and conditions of payment of the premium, the amount of Collateral required by the Surety or other restrictive limitations imposed by the Surety and agreed to by the principal, or his indemnitors, in order that the surety may safeguard his investment. Providing such restrictions are neither illegal or immoral. If such be the case, then it becomes a separate matter before the Courts. It is quite evident that the defendant could not find a prudent banker, altruistic newspaper investigative reporter, or other minder of other peoples affairs type organization that had $75,000.00 worth of confidence in either him or his collateral. So he sought out Mr. Kelly. I can imagine what Mr. Kelly went through. I can hear the pleadings of the sobbing wife; the protestations of the defendants absolute innocence, telling of his lawyers promises that they had no case against him; of his complete and absolute honesty, that he would never run, and finally his offering to sign over everything that he and his wife now owned, plus pledging whatever might be accumulated by his progeny for generations yet unborn. So Kelly gave the defendant a break. He reduced his own share of the commission of the premium and made the bond. At this point I doubt that the collateral was sufficient to cover the $75,000.00 in the event of a forfeiture. He made the bond, and when the defendant walked out of the jail, Mr. Kelly had fulfilled his agreement. He put the man on the street. When the defendant appeared in court six days later, the Prosecutor recommended the bond be increased by $125,000.00 and the judge increased it. Not Kelly, the bondsman—It was an action of the court. The defendant wanted Kelly to pick up the additional bond. Kelly refused. Why? Well even if Kelly would agree to write the bond at the reduced rate of 8 percent, he has to have $10,000.00 plus an additional $125,000.00 collateral. He is in over his head at $75,000.00. The defendant can't raise the $10,000.00 premium and there is no way in the world he can come up with an additional $125,000.00 collateral. Take the deal to your banker, see whether he thinks it would be a sound economic decision to go in deeper. Take it to Prof. Katz, may be he can find a legal way that the State can subsidize the defendant. I submit that we bondsmen may not all be Law Professors, or hold Ph. D.'s in Journalism or Sociology, but we didn't just come down with the morning's dew either. The publication of that segment of your reporters journalistic search for fame, fortune, and prestigious standing among their peers, was unjustified, not newsworthy and not in the public interest. Rather it was a continuance of your efforts to portray All Bondsmen as being akin to jackals and to indict us as being unfit to hold communion with true and upright men.

I have previously heard your complaint that "Bondsmen surpass police in Power", from a few, a very few police officers. Usually a newly elected County Sheriff, a recently appointed deputy, a disgruntled city policeman, and occasionally a newly appointed police executive. Rarely, if ever, from an experienced law enforcement officer or a County Prosecutor interested in having fugitives returned to his jurisdiction. I have heard the same people get involved in territorial jurisdictional disputes; I've heard them denounce fraternal brothers who made arrests under their very noses under the "Hot Pursuit" law. I have heard these same people denounce the equal employment opportunity laws which require females, blacks, and other minority groups be hired and trained as law enforcement officers. Oh yes, these same people speak harshly of having to present their evidence before black jurists, and then having it cross-examined by a black attorney representing the defendant. I place very little credence in their bitching.

Let's see where all this "power" comes from and why. Part of it you have already read. Let's continue: Arrest in another state—"The right of the surety to pursue their principal into another state to arrest him there was well recognized in the early decisions and has been reaffirmed in the later ones." "Bail has no power to arrest the principal in a foreign country. (Reese vs. 9 Wall 13) But as between the States of the American Union, the bail of one held to answer in one state may arrest the principal in another state, and no requisition is necessary. "(Sally vs. Werner 71 111 App. 96) "In the relation in which the several states composing the Union stand to each other, the bail in a suit entered in another state have the right to seize and take the principal in a sister state * * *" (Republican vs. Gaoler of Philadelphia 2 Yates 263)

The foregoing should be sufficient to convince you that sureties do have the right to pursue and arrest their principals in another state. Now let's look at a few opinions as to why they have been given this right.

"The right of the surety to recapture his principal is not a matter of criminal procedure but arising from the private undertaking arising from the furnishing of the bond". (This confirms my previous statements concerning the bail bond being a private contract between the Surety and the Principal) "It is not a right of the state, but of the surety. If a state desires to reclaim a fugitive from his justice in another jurisdiction it must be processed by way of extradition, in default of a voluntary return. It cannot invoke the right of a surety to seize and surrender his principal for the rule is a private one and not a government remedy. It is equally true that the surety, if he has the right, is not required to resort to legal process to detain the principal for the purpose of making surrender. There is no conflict between the right. Extradition can only be exercised by the government. Surrender by bail can be exercised only by the individual who is bail. The remedies are separate and distinct. As long as the principal remains within his jurisdiction, the right of the bail to arrest and surrender him is conceded. As the right is a private one and not accomplished through government procedure, there would seem to be no process, judicial, or administrative to seize his principal. Jurisdiction does not enter into the question (In re Van der Ake, 85 Fed. 959 * * *) "The right of a surety to seize his principal in another state entitles him to return him to the state he left and where the bond required his presence. The right to seizure without the accompanying right of return to the state where the bail was furnished would be without value * * *" "The rights of bail are not identical with those of the prosecuting government. They arise out of the relationship of the principal and his bail, and not altogether the result of subrogation to the rights of government. * * * The bail can surrender his principal before the bond is forfeited and arrest for that purpose. The state, however, cannot. The state can remove a defendant from another state only by extraction. It does not follow that a surety is under a like disability in returning the principal to the state from which he fled to surrender him * * * Bail does not acquire the right to seize and surrender the principal from the state through subrogation since the state has no sue right itself. It is the original right that arises from the relationship between the principal and his bail, and not derived from the state". (Fitzpatrick vs. Williams, (C.C.A.5), 46 Fed. (2nd) 40, 73A, L.R. 1305. Cf 1n Re Van der Ake (7 Pa. D.R. 131; 20 Pa. Co. Ct. 305, 85 Fed. 959.)

Perhaps you can attend some of the classes of your friend and apparent advisor, who apparently wants bondsmen exterminated, and have him explain all this to your reporters. Incidently, I would like to say Prof. Katz that I know of no bondsman who are being subsidized out of the Public Treasury, however, conceding the possibility of an isolated case or perhaps two, it is no secret that colleges and universities are subsidized by State and Federal Funds, from which Professors salaries are paid. I am going to say that in sheer numbers there are more people, in the course of a year's time, who use the services of a bondsman, than there are that require the services of a Law Professor; thus, I am not completely convinced than from the standpoint of practical utility, that a Law Professor serves any useful purpose.

Rutti and Bogdanich seems to feel that "Bounty Hunters" are a problem. Maybe so. You must remember that the typical client of the bondsman is not considered to be a piller of the community, a referred risk by the bankers; one of the more substantial contributors to the maintenance of his church and the welfare of his pastor by his spiritual leader, and he is usually accused of possessing many other short comings including disrespect and a militant attitude towards law and order in general and law enforcement officers in particular. Some of them even shoot and kill law enforcement agents. In such instance, if he were free on a Surety bond, he would be much, much safer to surrender himself, or be taken by a bondsman or Bounty Hunter, than he would be if he were captured by fellow officers of the slain brother. You don't take a Pekinese alone when you go hunting for tigers or grizzly bears. You complain that the agents handle the fugitives roughly. Did you see the TV coverage of the Iranian demonstration in Washington? I saw uniformed police dragging demonstrators away by their feet, two of them dragging one skinny looking fellow away; others were lathering the demonstrators with their shilleleighs. If you recall, a few weeks back it took several law enforcement agencies to recapture a fugitive bank robber near Lodi, Ohio. As I recall, they literally put the dogs on him. So you found one that is now a fugitive himself. Quite recently a Judge and former Prosecutor of a neighboring county was convicted and sentenced to prison for wrongdoing; members of the Congress of the United States have recently been indicted and many more are under investigation for accepting bribes in exchange for selling the influences of their offices of public trust; within the past three years, nine county sheriffs have been indicted, some tried and convicted and others awaiting trial, for breaches of the public trust and criminal wrongdoing. A chief of police in a neighboring county was forced to resign for his misconduct in office. It hasn't been to long ago that several Cleveland police officers were dismissed for being part of a burglary ring. Yes, even a President of the United States was forced to resign, along with members of his cabinet and his aides. Some of them were even sent to prison. So you see it isn't so unique that you would find a "Bounty Hunter" that went wrong. I do not condone a breach of faith by anyone. However, should I become aware of someone who has broken a trust, I do not make any attempt to try and convince the general public that everyone who might be engaged in a like enterprise should also be condemned. In every area of industry, commerce, education government, law enforcement, the practice of law, or whatever, we often find that we could have made better choices in our selection of personnel. The manner in which you reporters, Bogdanich and Rutti, have slanted their report, is irresponsible reporting. The fact that the Plain Dealer printed the report, in this manner, makes it equally as irresponsible.

Up to this point we haven't found anyone, you have condemned, that has done anything morally or legally wrong. Your reporters have slanted their reports in such a manner as to make a custom as old as the country itself, a form of bribery of a public official. What's worse, you have added insult to insult by insinuating the the Court officials have shown leniency beyond what is reasonable in return. I don't believe you. If one bondsman can buy an official for a bottle of booze, I'll buy him back for two bottles, and let's get on with the bidding. All businesses do it. An employer gives his employees a bonus for work well done—this is ordinarily done during the Holiday Season—waitresses garner tips every meal. If these reporters know of a specific incident that is in violation of the law, it is their duty to bring the charge or charges before the proper officials. They (the reporters) are out of bounds when they make sweeping charges in an attempt to mislead the public to believe that this type of thing is a common practice among all bondsmen, and they do it for the purposes of bribing officials. Let me say that anytime I want to make manifest my feelings of kindness and considerations for a fellow being (irrespective of that person's station in life or any office he may be holding). In a form of some material present during the Holidays, or at any other time the notion strikes me, I'll do it. I could care less for the opinions of the Plain Dealer reporters, or anyone else.

Let's talk about Forfeitures, Bondsmen's right to act as their own counsel and continuances. That is the order in which they occur through the legal process. the forfeiture occurs when the poor, beleaguered defendant, or bondsman's "victim" if you prefer, fails to appear. Section 2937.35 of the Ohio Revised Code—Forfeit of bail. Upon the failure of the accused or witness to appear in accordance with its term, the bail may in open court be adjudged forfeit, in whole or in part by the court or magistrate before whom he is to appear. But such court or magistrate may, in its discretion, continue the case to a later date certain, giving notice to him and the bail depositer or sureties, and adjudge the bail forfeit upon failure to appear at such later date. Section 2937.36 Forfeiture Proceeding. Upon declaration of forfeiture, the magistrate of Clerk of Court of the Court adjudging forfeiture shall proceed as follows: (Since recognizance bonds posted by sureties are under discussion, let's skip down to (C). "As to recognizances, he shall notify accused and each surety by ordinary mail at the address shown by them in their affidavits of qualification or on the record of the case of this default of the accused and the adjudication of forfieture and require each of them to show cause on or before a date certain to stated in the notice, and which shall be not less than twenty, nor more than thirty days from the date of mailing notice, why judgment should not be entered against each of them for the penalty stated in the recognizance. If good cause, by production of the body of the accused or otherwise is not shown, the court or magistrate shall thereupon enter judgment against the sureties or either of them, so notified, in such amount not exceeding the penalty of the bond, as has been set in the adjudication of forfeiture, and shall award execution thereof as in civil cases.

Does the surety have the right to counsel and can he represent himself? Judge McMahon appears to think they have that right and so do I. Adm. Judge Spillacy says, "No, they can't. I disagree with Judge Spillacy. The surety, in the matter of the forfeiture, now stands before the court as a defendant. Remember he has been called before the court to show cause why the forfeiture should not be levied against him. Thus he now becomes a defendant.

In Chapter 17.4 of the Ohio Criminal Code, we find "The Constitution guarantees the right of an accused or defendant to defend in person or by counsel". He can, in his own behalf, file written motions, present evidence or if the court permits him to do so, make oral motions in open court. He can move to be discharged from the obligation; to have the amount of his forfeiture reduced; or it is not improper to request the court for additional time in which to satisfy the obligation. Denial or granting of the motions are at the discretion of the court. In any case, he has not acted improperly. As for your "legal experts"—all parties to litigation, regardless of whether they are of the 1st, 2nd, 3rd, 4th, or 5th part, are entitled to representation of their particular interest, by counsel or in person. See Section 2937.97 GRC Remission of Penalty. (For the Surety's Right to request Remission of his forfeiture. By counsel or in person. Now as to your holding bonding agents up to public ridicule for having made contributions to candidates for political office. Print for public reading anything you can find anywhere in the law that permits anyone to make contributions to political candidates of their choice "excepting Bail Bonding Agents in cases involving Judges of Municipal, Common Pleas, or any other Court of Law"—and I will kiss the hem of your garment or any place else you say, on the Public Square in Wooster, Ohio, at high noon on any day selected by you, and give you forty-five minutes to assemble a crowd. I see you mention Judge Frederick Coleman. Had I known he was running, you would have found my name on the list of contributors also. Judge Coleman is a fine capable, dedicated man. He is also a personal, dear friend of mine. We did a lot of soldiering together. He will do to go up the hill with. If he seeks the office again, or any other office, I shall be more than happy to contribute to his cause to the extent of my purse. I don't do business in his court, but if I did, I would not compromise him by seeking special treatment. Again, the people you are condemning have done nothing wrong. I have read endorsements of Political candidates by the Cleveland Plain Dealer. I think I can say without fear of criticism from anyone, with the possible exceptions of the Plain Dealer, that one such endorsement is worth more than ten times the amount of money contributed by the bonding agents over the past two years. Why have you singled out Bonding Agents? They do not deal directly with judges, except when forfeitures have been levied. How about attorneys. They deal directly with the Courts. Their sole business depends upon the misfortunes of others and the complicated situations in which people find themselves. Otherwise there would be no need for their existence. How many attorneys made contributions to judicial candidates? How much did they contribute? What were their motives? How about the fees they charge for seeking a continuation of the "Freedom" that has been "Sold" to the "Victim"—of the Surety. Are they reasonable? If so, or if not, who sets the standard? The Plain Dealer? Should attorney fees be regulated. If so, by whom? If not, how do they differ from the bondsman's fees? Perhaps Prof. Katz has the answers to those questions. Ask him.

Kill the Bondsmen. Over the years, that I have been the bail bonding business, since 1950, periodically, utopian thinking minders of other peoples affairs, bleeding hearts, news reporters hunting "sensational" stories, libertarian lawyers, an occasional jurist, and even publicly seeking legislators have raised a hue and cry for "Bail Bond Reform". To accomplish this they feel they must first bring about the demise of the Bonding Agents. They complain that Bondsmen discriminate against the poor. They cite "unpaid forfeitures". They classify all bonding agents as being criminals, ex-convicts, having racketeering connections—in fact, any allegation they can imagine that will discredit the bonding agent. The very fact that defendants seek the services of bonding agents, according to these people, is the underlying and sole cause of all the things that do or can go wrong in the bail system. Nothing is wrong with the system, just its administration. This is an opinion in which some uformed judges concur. I submit that they are wrong. There is not now, nor was there ever anything wrong with the system. The fault is to be found with the administration of the system by the Clerk of Court and the judges, and prosecutors, themselves who have found their particular courts open to criticism. The various offices of state, county, and municipal government are created by statutes. Those same statutes outline the duties of the office. The office of the Clerk of Court was so created. Among the duties assigned to the Clerk of Court was the administration of the bail bond system. He is responsible for the collection of forfeited bail and for the return of bail deposits and discharges of liens when the purpose of the bail has been satisfied. After forfeiture has been levied and reduced to judgment, and the forfeiture has not been paid within the time set by the Court, the Clerk of Court may proceed to collect as in a civil case. Since he has the authority to pass judgment in the qualifications of the surety, he likewise may suspend the privilege of the surety to post bonds in his court until forfeiture has been satisfied. The Clerk of Court cannot increase or reduce the amount. He can, however, be held pecuniarily liable if he is negligent in collecting such monies as he is required to collect. This not only includes corporate sureties. If real property is accepted by him as collateral, and the bond is defaulted, he can levy on the property. No reason to denounce the superintendent of Insurance. Any action that can be taken in a civil action to collect a debt is available to him. So if forfeitures are not paid, then let's look to the person responsible and not hysterically request the legislature to disenfranchise sureties and bonding agents. A corporate surety, the principal of a bonding agent, must file with the Superintendent of the Department of Insurance. When the Superintendent of Insurance is satisfied that the surety has complied with Ohio Laws, he issues a certificate of Compliance. Such a certificate, along with a General Power of Attorney appointing him agent for the surety is filed by each agent with the Clerk of Court. So further yet, the Clerk of Court may appeal to the Superintendent of Insurance for payment of the forfeiture from the deposit of the Surety. He may further request the Superintendent to revoke the State license of the Surety. This of course, would further litigation between the Superintendent and the Surety. So you see there are rules and safeguards. The Bond system in other courts in Ohio is not in a mess. Someone is supposed to be minding the store. I have, and do, write bonds in all classes of courts all over the State of Ohio. I can honestly say that most of the Clerks of Courts where I write, are attending to their knitting. They make you file your credentials. If a defendant fails to appear, they notify you immediately. If a forfeiture is levied against you and it is not paid when it is called, you are "shut off" and they are on you like a duck on a June bug until it is paid. Furthermore, should you show a continued reluctance to pay, likely as not, they will be equally as reluctant about reinstating you.

If the bonding system isn't being handled this way in the city of Cleveland, the Cleveland Officials are irresponsible and negligent. Rather then standing idly by looking for someone on whom to place the blame, shrugging his shoulders and saying "the bondsmen call the shots", I suggest that your prosecutor, John T. Corrigan arm himself with full knowledge of the law and invade the bailiwick of the Clerk of the Courts. Judges must share responsibility for creating malfunctions in the Courts Bail System. Assault him with a charge of his duties, if he seeks refuge behind the excuses of lack of knowledge of procedure, pursue after him with the legal assistance and backing that he has the right to expect and show him how to do it—if he still does not—then grab him by the small of the stock and dart to hell with him. The Administative Judge should set policies that are designed to assist the Clerk in carrying out his duties. Such policies should be guidelines and all parties concerned, including bonding agents, should have knowledge of them. Policies that are designed to restrict the bonding agent in his right to earn his living by the pursuit of his vocation, and thus inadvertently deny the defendants their constitutionally guaranteed right to have bail posted for them by a reliable surety, will only serve to cause cheating and a search for ways to circumvent the restrictions.

The world has always been blessed, and I am afraid always will be, with uninformed do-gooders and meddlers, people who feel that they know what is best for others. If I were a psychologist, which I'm not, I would suggest their attitudes are the result of early childhood experiences with over protective parents. Such phrases as "don't do that, it's not good for you"—"do this", or "take this", "it doesn't matter that you don't want to or don't like it, it's good for you", keep ringing through their heads. Hordes of peope have this problem in common, so they band themselves together under descriptive names that can be reduced to one shortened word by combining the first letter of each word. They elect officers, appoint committees and attempt projects of great magnitude. They pass resolutions denouncing this policy, adopting resolutions to promote new policies, seek publicity, assault legislative bodies, solicit the aid or the names of people in high places, conduct demonstrations and sometimes even conduct themselves in an unseemly and riotous manner. All this and more do they do in order to do something that is good for people who have neither solicited their help nor who do not want these things done for them.,

Out of such situation came the "10 percent Rule". These people commenced their campaign in the late fifties, and by the late sixties had mustered sufficient strength and so they tried to ram it through the legislature in 1967–1968. Their battle cry was "Get rid of surety bondsmen. They are evil. They are corrupting the courts. They serve no useful purpose. They discriminate against the poor, the blacks, and minority groups. Pass our plan into law and it will solve all the problems. Everybody will be immediately released from jails. Our plan will help the poor, the minorities, and the underprivileged. The wiser heads in the legislature saw the pitfalls inherent in the plan and wisely rejected it. However, the proposal did not die the death of the rag doll that it was.

About this time in the early 1970's, the State of Ohio finally recognized the absolute necessity of creating additional municipal courts to replace outdated Justice of the Peace and Magisrate Courts, and some Mayor's Courts and to create new Judgeships for Common Pleas Courts. A giant step forward in furtherance of jurisprudence for the State of Ohio. Also, about this same time, the late C. William O'Neal, then Chief Justice of the Ohio Supreme Court, with the assistance of the State Bar Association and others began to revise the rules governing Rules of Procedures for Courts in Ohio. Let's examine it. On July 1, 1976 the Ohio Supreme Court published the Rules governing the Court of Ohio. "The purpose of this pamphlet is to provide attorneys, judges, and law students with a convenient reference to rules governing the courts of Ohio. Except for the local rules of the Courts of Appeals, and the Rules of the Court of Common Pleas—Cuyahoga County. The rules contained in this pamphlet result from the Supreme Court's power to present rules governing practice and procedure in all courts of the state granted in the Constitution of Ohio. See Ohio Constitution Act IV, Section 5(B) (Page's Code appendix volume). Supplement thereto. This subsection also permits courts to adopt rules for local practice which are not inconsistent with those of the Supreme Court, and grants the court supervisory power and power to grant admission to the practice of law and to discipline those admitted to the bar. The legislature has granted the Ohio Supreme Court further specific power in Ohio Revised Code, Section 2937.46 to prescribe uniform procedures in traffice cases".

The Supreme Court of Ohio has neither power or authority to enact laws. They do not have the power nor authority to amend, or modify the statutes that have been enacted into Law by the legislature. The Judicial Branch of the Government is not a Law Making Body. They cannot amend a statute or revise or modify it by adding words to it, nor can they expunge words from any statute. Conceding the truthfulness of the documented information I have just given you, and since we are discusing Bail, let's skip thru this "convenient reference pamphlet" down to Rule 46(C)(3) Pretrial Release in felony cases, and Rule 46(D)(1) Pretrial Release in misdemeanor cases. (References to Sections 2937.22, 2937.29, 2937.99, and 2937.41 of the Revised Code.) First, however, I think we should see what the statutes as passed by the legislature has to say, so that we have a proper basis for comparison.

Section 2937.22 Forms of bail; Receipt. Bail is security for the appearance of an accused to appear and answer to a specific criminal or quasi-criminal charge in any court or before any magistrate at specified time or at any time to which a case may be continued, and not depart without leave. It make take any of the following forms:

(A) The deposit of cash by the accused or by some other person for him.

(B) The deposit by the accused or by some other person for him in the form of bonds of the United States, this state, or any political subdivision thereof in a face amount equal to the sum set by the court or magistrate. In case of bonds not negotiable by delivery such bonds shall be properly endorsed for transfer.

(C) The written undertaking by one or more persons to forfeit the sum of money set by the court or magistrate, if the accused is in default for appearance, which shall be known as a recognizance.

All bail shall be received by the clerk of the court deputy, clerk of court, or by the magistrate, or by a special referee appointed by the supreme court pursuant to section 2937.40 of the Revised Code, and except in cases of recognizances, receipt therefore shall be given by him.

The 1967–1968 session of the Ohio General Assembly enacted into law, by statute, the right of an accused to be released on his own recognizance. The session rejected the "10 percent" proposal by refusing to pass it into law.

Section 2937.29 Release on own recognizance.

When from all the circumstances the court is of the opinion that the accused will appear as required, either before or after conviction, the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in section 2937.99 of the Revised Code.

Section 2937.41 Return of bail; notice of discharge of recognizance.

On discharge of bail, the magistrate or clerk of court shall return cash bail or bonds deposited to the person depositing the same, but, may require presentation of original receipt issued as condition thereto. In case of recognizance, the magistrate or clerk of court shall endorse the satisfaction on the recognizance and shall forthwith transmit to the recorder notice of discharge provided for in section 2397.26 of the Revised Code.

You will note that the statutes make no provision for the "10 percent" deposit. The statutes do not make any qualifications as to who "the some other person" shall be. Note further that it makes no exceptions as to "Bondsmen". Also note that the statute provides that "the Clerk of court shall return the cash bail". It does not say "a percentage" of it.

Now let's look at the reference pamphlet, the Rules cover the procedures of courts in Ohio, has to say in their explanation: Rule 46(c) of the Criminal Procedure Section.

Rule 46. Bail.

(A) Purpose of and right to bail. The purpose of bail is to insure that the defendant appears at all stages of the criminal proceedings. All persons are entitled to bail, except in capital cases where the proof is evident or the presumption is great.

(B) Pretrial release where summons issued. Where summons has issued and the defendant has appeared, the judge shall release the defendant on his personal recognizance, or upon the execution of an unsecured appearance bond.

(C) Pretrial release in felony cases. Any person who is entitled to release under subsection (A) shall be released on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judge, unless the judge determines that such release will not assure the appearance of the person as required. Where the judge so determines he shall, either in lieu of or in addition to the preferred methods of release stated above, impose any of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) Place the person in the custody of a designated person or organization agreeing to supervise him.

(2) Place restrictions on the travel, association, or place of abode of the person during the period of release:

(3) Require the execution of an appearance bond in a specified amount, and the deposit with the clerk of the court before which the proceeding is pending of either $25.00 or a sum of money equal to ten percent of the amount of the bond, whichever is greater. Ninety percent of the deposit shall be returned upon the performance of the conditions of the appearance bond.

(4) Require the execution of a bail bond with sufficient solvent sureties, or the execution of a bond secured by real estate in the county, or the deposit of cash or the securities allowed by law in lieu thereof, or:

(5) Impose any other constitutional condition considered reasonably necessary to insure appearance.

(D) Pretrial release in misdemeanor cases. A person arrested for a misdemeanor and not released pursuant to Rule 4(F), shall be released by the clerk of court, or if the clerk is not available, the officer in charge of the facility to which the person is brought, on his personal recognizance, or upon the execution of an unsecured appearance bond in the amount specified in the bail schedule established by the court. If the clerk or officer in charge of the facility determines pursuant to subdivision (F) that such release will not reasonably assure appearance as required, the person shall be eligible for release by doing any of the following, at his option:

(1) Executing an appearance bond in the amount specified in the court's bail schedule, with a deposit of either $25.00 or a sum of money equal to ten percent of the amount of the bond, whichever is greater. Ninety percent of the deposit shall be returned upon the performance of the conditions of the appearance bond.

(E) Release after conviction. (Not at issue here)

(F) Conditions of release: basis. In determining which conditions of release will reasonable assure appearance, the judge shall, on the basis of available information, take into consideration the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character, and mental condition, the length of his residence in the community, and the record of his appearances at court proceedings or flight to avoid prosecution or of failure to appear at court proceedings.

(G), (H), (I), (J) Not at issue.

(K) Sanctions. Any person released pursuant to any Provisions of this rule who fails to appear before any court as required, is subject to the punishment provided by law, and any bail given shall be forfeit.

Any person released on his personal recognizance shall, in addition, be deemed to have been released pursuant to R.C. 2937.29.

(L) Justification of Sureties. Every Surety, except to a corporate surety licensed as provided by law, shall justify by affidavit, and may be required to describe in the affidavit, the property which he proposes as security and the encumberances on it, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. He shall provide such other evidence of financial responsibility as the court or clerk may require. No bail bond shall be approved unless the surety or sureties appear, in the opinion of the court of clerk, to be financially responsible in at least the amount of the bond. No licensed attorney shall be a surety.

(M) Forefeiture of bonds. If there is a breach of conditions of a bond, the court shall declare a forfeiture of the bail. Forfeiture proceedings shall be promptly enforced as provided by law.

(N) Exoneration. The obliger shall be exonerated as provided by law. In 49(C)(3) and 46 (D)(1) are the only places where the so-called "10 percent Rule" is mentioned. It is nowhere in the statutes. Likewise, nowhere either in the statutes or in the "Rule" itself is there any mention made of any prohibition against Licensed Surety Agents either making personal loans to a friend or even against their entering into a contract or agreement with an accused to make the cash deposit for him. Show it to me anywhere in the law and I will undergo the same penalty as I have placed upon myself in the early part of this rebuttal concerning the political contributions. Not that I am interested in doing it, but if it is there, as your experts say it is, I want to see it. Money is like a poker chip. It has no home. As to who had dominion over the cash prior to its being deposited with the clerk of court, is not, in my opinion, any concern of the court. Cash in hand is the best collateral for a bond that I know of.

Note the difference between the wording of the statutes and the wording of the "reference phamplet". On page 93 of the reference phamplet, there is a set of "code" letters that are used to show what references are in conflict with the statutes. The statutes which I have noted above are shown as references and are noted as being in conflict with the statutes as they are explained in the Rule Book. The courts have adopted these Rules as their laws and have put them into common practice. Thus we find that the Supreme Court has, without authority to do so, modified the statutes that were passed into law by the only law making branch of the government, the legislature, and by doing so they have: (1) Added an additional provision to Section 2937. 22; (2) They have modified Section 2937.41 by permitting the courts to keep a portion of the deposits made by depositors for bail; and (3) They have put the courts of the State of Ohio in the Commercial bail bonding business in direct competition with tax paying citizens who are legally engaged in a like enterprise as a means of earning their livelihood.

Thus we have "10 Percent Rule". Spawned in the fertile breeding grounds of Civil Unrest, the youth Rebellion against the Establishment and The Social Reforms of the 1960's. It was sired by the Irresponsible and Negligent administration of the bail system by the court officials charged with such responsibility; mothered by the Hysterical Emotionalism common to such groups and organizations as I have previously mentioned. It was aborted by the legislature; then it was miraculously resurrected in the womb of the State Bar Association, delivered, and covertly eased into the judicial system by the late C. William O'Neil, then Chief Justice of the Supreme Court, attended by midwives of the State Bar Association Commission to rewrite the Rules of Procedure for the Courts of Ohio and was christened "Rule 46".

Rule 46, nicknamed "the 10 Percent Rule", was delivered into the world kicking, screaming, shouting, and loudly acclaimed as being the saviour of Poor, the minority groups, the underpriviledged, that it would forever erase the inequities in the bail system; that it would eliminate the Sureties and the bonding agents and that it would forever free defendants, even those who need, require, and solicit their aid and assistance on bended knee, from the evil and grasping clutches of these sureties and bonding agents. The news was highly publicized that with the resurrection of this "Savior", that the "poor" defendants would no longer have to languish in jails because they lacked funds to pay for their release. According to the recent expose in the Cleveland Plain Dealer, the "10 Percent Rule" was designed by "the Supreme Court to help the poor" make their bonds. I make the public charge that the sole and only intent and purpose of the "10 Percent Rule" was and is, to do exactly the only thing that it has done and is doing, and that is "to put the sureties and the bonding agents out of Business".

In effect, Sureties, Bonding agents, defendants and depositors of cash bail have been sued in bastardly for this illegitimate and unconstitutional delusion and fraudulent brainchild of the people who I have mentioned, tried, and found guilty without trial, by the courts who resurrected it and are now using it as a means to disenfranchise them. Their punishment has been its maintenance and support through the sureties loss of business and the depositors pay their share through the illegal withholding of a percentage of their deposits of cash bail.

I publicly charge that the "10 Percent Rule" is (1) Unconstitutional; (2) Illegally Administered; (3) A delusion; and (4) A Fraud.

(1) Unconstitutional. The "Rule" came into effect as the result of the Supreme Court modifying a Statute of the Revised Code of the State of Ohio, Section 2937.22, by adding a paragraph; Only the legislature can enact laws, modify them, amend them or rescind them. The Constitution grants the Supreme Court no such authority.

Neither the Constitution nor the statutes of the Revised Code of the State of Ohio makes any provision for the courts of the State of Ohio to enter into a commercial enterprise, either in competition with tax paying citizens or as an unentered filed of endeavor. The retention of a 10 Percent commission for cash bail deposited according to the "10 percent Rule" puts them in the Bail Bonding business.

Section 2937.41 of the Revised Code provides that cash bail shall be returned to the depositor. There are no provisions for the court to return a percentage or to retain a percentage. Any action contrary to the provisions of a statute is illegal. Thus the retention of 10 percent of the deposit of a bail deposit is an illegal act.

The "10 Percent Rule" is a delusion. When the practice came into existance as of July 1, 1976, it was widely publicized as being "beneficial to the poor, unfortunate defendants who could not make bail for financial reasons". "It would put an end to the practice of Bondsmen discriminating against defendants who had no money". Now everyone was to have an "equal opportunity" to make their bail. Has the rule done this? I submit that it has not. This has become obvious when you look at the provisions of the "rule". The requirement is that the defendant must deposit a sum of money equal to 10 percent of the specified amount of the bond fixed by the court. Anyone who can afford to deposit 10 percent of the bond amount, can also afford to pay the surety's premium. If he cannot afford to pay the surety's premium, then he cannot afford to make the 10 percent deposit required by the "Rule". So the poor still "languish" in jail, while those with money go free. This time not by design of the bondsmen. So, pray tell me, how has it helped the "poor"? The publicity attending the instigation of this practice has served no other purpose than do delude the public into believing that the courts have made a great "reform" in the bail system, and that "poor defenseless, unfortunate defendants will no longer be the "prey" of evil bonding agents. It is a delusion.

The "10 Percent Rule" constitutes a fraud against (1) the depositors; (2) Sureties and bonding agents; and (3) The State of Ohio. Let's look at them in the order as listed: (1) The Depositors. The illegal retention of 10 percent of his deposit, when the statute specifically provides that "cash deposits of bail shall be returned to the depositor when the terms of the recognizance have been satisfied "-", indicates that his money has been taken from him illegally with the intent to deprive him permanently, and that makes it a fraud.

(2) The sureties and Bonding agents. The real intent and purpose of the 10 Percent Rule, as devised by its designers, was to "Eliminate the bondsmen". Witness the statement of a municipal judge, and I quote in part, "* * *, I will go the 10 Percent Rule and eliminate all bondsmen". Another statement made to me personally, "What are you going to do now Shorty? We are going to the 10 Percent Rule and eliminate you bondsmen". "Things must be pretty tough for you now. Since we went to the 10 Percent Rule, we have about put you bondsmen out of business". The Akron courts, "No bondsman can post bonds in our courts now. We went to the "10 Percent Rule" and put them all out of business". That appears to be the general sentiment. Not all courts are so disposed. That the real and evil and fraudulent purpose of the "Rule" is working, is evidence by the fact that many surety companies went out of the business. A great many bonding agents had to seek other fields of endeavor. Surety bonding may still be a thriving business in some metropolitan areas, such as Cleveland, Columbus, and Cincinnati. There are a few around other places. Maybe as many as ten over the rest of the state. Where does the fraud come in? Pay attention: All through this rebuttal, I have emphasized that the defendant has the right to make his bail or to have someone make it for him. He is guaranteed

this right under the Constitution of the United States, the Constitution of the State of Ohio and by the Statute of the Revised Code of the State of Ohio.

The Surety bonding business, while a very risky one, is a legitimate business enterprise. The Superintendent of Insurance has gone to the trouble of issuing licenses to Surety Companies in order to have some measure of control over them. A surety's agent must have a license issued by the Superintendent of Insurance. The Constitution gives the defendant the right to HIS choice of his bail. The United States Supreme Court and all other lower courts have held that the contract between the defendant and his bail is a private one and that it does not arise out of any action of the court, and is of no concern of the court. Not only has the "10 percent Rule" restricted the defendant in the choice of his bail, and not only has it not enhanced the position of the poor, it has, in fact, worsened the chances of the "poor". Due to the severe curtailment of his income by this unlawful restriction of his business, the bonding agent is now even more reluctant than ever to take an occasional "chance" and extend credit terms to defendants when he knows that he has only a 95/ to 5 percent chance of ever collecting his fee. He is reluctant to even talk to the defendant when he is called. He knows that the only time that he gets a call for a defendant in a municipal court action, where 75 percent of the business originates, that the defendant does not have any funds. Ten percent may have funds, but not on their person and would be worthwhile clients; 45 percent are gainfully employed and can pay on their pay days. Some of these are good risks; the remaining 45 percent have no resources, no access to anyone who might have, they are unemployed, have poor work records, promise their wives or roommates welfare checks, promise to pay when they get a job. How has the "10 percent Rule" helped them? So I submit that unconstitutional act of the supreme court in amending a statute and that the evil intent and the fulfillment of its intent to deny the surety and the bonding agent the right to conduct a lawful business is fraudulent in every sense of the word, and further, since the 10 percent Rule is not covered by a statute and since there is no place in the stautes, nor in the "Rule" itself for that matter, that defines who may make the deposit for a defendant, that any denial by any court, of the right of another person to make such a deposit for him, on the grounds that such person is a "Bondsman" is unconstitutional. For a judge to demand that a depositer, other than a defendant himself, whether or not he be an agent for a surety, produce a "lender's license", before a cash deposit will be accepted from his, is equally unconstitutional and illegal. It cannot be sustained at law. Cash needs no additional collateral. Once again the law makes it clear that a contract between a defendant and his bail is private one. Should the judge, or anyone else, have evidence that anyone is "loan sharking", then let him bring the charges before the law in the proper manner. If the defendant's mother loans him the money to make the deposit and asks that the receipt be made out to her to insure that her money is returned to her, should she be required to produce a "lender's license?" If you still feel that the "10 percent Rule" was designed to "help the poor", then read on: The judge, who said he would go to the "10 percent Rule" and eliminate all bondsmen did adopt that policy for the first time in his court. It was announced by headlines in the newspaper and hailed as a tremendous step forward in reforming the bonding laws in the State of Ohio and would be a great boon to the poor.

Let's look at the results: Two bonding agents closed their offices in disgust and went out of business. Two out of three with one shot is pretty fair shooting. Prior to 1978, when this all took place, the bonding schedule for this particular court, in misdemeanor and traffic cases read something like this: DWI $500.00, Fleeing the Police $500.00, Drag Racing $500.00, Resisting Arrest $200.00, Reckless Operations $200.00, Disorderly Conduct $25.00, Trespassing $50.00–$100.00. Such a schedule applied to local residents. For out of the county and out of state offenders, it was a little higher. At about the same time as the "10 percent Rule" was adopted in this court under discussion, another innovation was introduced into the judicial system known as "Plea Bargaining". An old cowboy once said "There was never a horse that can't be rode, and there was never a rider than can't be throwed". Someone will always find a way to turn things to own advantage. Thus it was with this plea bargaining business. Attorneys began to turn it against the law enforcement agencies to the advantage of their clients. The end result was that the law enforcement agencies, with the possible exception of the State Highway Patrol, began entering multiple charges against defendants on nearly every arrest. Going back to the bond schedule, suppose that the defendant wound up with charges of, say, DWI ($500.00), Fleeing the Police ($500.00), and disorderly conduct ($25.00), Resisting Arrest ($200.00). Under the "10 percent Rule" he would have had to come up with a cash deposit of 10 percent or $125.00. Not much to round up, even on Saturday night. With the adoption of the "10 percent Rule" to eliminate bondsmen by this court, the bond schedule was changed to read something like this: DWI $3,000.00, Fleeing the Police $3,000.00, Resisting Arrest $2,250.00, Drag Racing $3,000.00, Criminal Trespassing $3,000.00, Disorderly Conduct $750.00, Speed $100.00, Weaving $100.00, Now let's see what happens to our "poor Defendant". He gets charged with weaving or speeding (as reason for coming under observation) $100.00, DWI $3,000.00, Disorderly Conduct $750.00, (using foul language), Fleeing the Police $3,000.00 (didn't stop in time), Resisting arrest $2,250.00 (Didn't want to get out of his car), total Bonds is $9,100.00. Required 10 percent deposit is $925.00 ($25.00 for the $100.00 bond). How many people do you know that carries that kind of cash around with them. It's the weekend and the banks are closed. Most people don't stash that kind of money around their homes either. Now, say again all after "The purpose of the 10 percent Rule is * * *" Was it really the intent of the judge to help the poor, the minorities, the underprivileged to be better able to make their bonds, or was it to deprive the bondsman of his right to earn his living? Fraudulent? Unconstitutional? Illegal? I think so.

So you say "But the defendant gets 90 percent of his deposit back and the bondsman doesn't give him back any of it." That's fine. However under the Law, he is entitled to 100 percent of his deposit back from the court when he has satisfied the conditions of his recognizance, not only 90 percent.

There is a difference between the court and the surety. Why should the court be entitled to keep anything. The court makes no investment. It takes no risk. It incurs no additional expenses. The personnel who accepts the deposits, fills out the required forms and gives receipts for the deposits are all salaried or hourly full time employees of the public. That is why they are so hired. Should the defendant default in his obligation, the court issues a warrant for him and he is, or should be, pursued by another publicly supported agency hired and trained at the public's expense for that purpose. What have they done to deserve compensation. Whereas the surety must risk his capital; from the time the obligation is undertaken until it is released by the court, he is under the pain of the penalty of forfeiting the entire amount of his investment should the defendant fail to appear. If he fails to appear, the surety must pursue after him at his own expense; he must maintain his shelter, heat, light, transportation, pay his employees, maintain his records and pay all other expenses incident to operating a business. If he seeks recourse against his principal for recovery of his losses through forfeiture by reason of the defendants failure to fullfill his part of the obligation, he must pay the legal expenses out of his own pocket. They do not come out of the Public Treasury. Why then should he not be entitled to his fee?

As to the State or Public. At this point please believe me that I have absolutely no objections to a defendant arranging for his bail, in any manner he is able to do so. Examine the mathematics of the "10 percent Rule". The Rule says "executing our appearance bond in a specified amount with a deposit with the clerk of court before which the proceeding is pending of either $25.00 or a sum equal to ten percent of the amount of the bond". What happens to the remaining 90% of the "specified" amount of the bond? The defendant can sign a guaranteed unsecured bond in an amount not to exceed $200.00. Remember that the statute fixes the responsibility for qualifying the surety and the liability for collecting forfeitures on the clerk of court. I have seen some clerks of court have the defendant sign unsecured bonds in amounts greatly in excess of two hundred dollars. In the event that the defendant should forefeit his bond, what evidence does the clerk of court have of assets upon which he might levy to effective collection? In those cases where a defendant is not required to sign an unsecured bond for the remaining 90 percent of his debt, in the event of forfeiture, what evidence of obligation does the clerk or the court have? Or, is it considered sufficient that should the defendant fail to perform the conditions of his recognizance, that he be required to only forfeit the full amount of his 10 percent deposit? If this latter be true, then I feel justified in saying that the fixing of "a performance bond in a specified amount" is merely for the purpose of arriving at an ultimative "cash bail" that will serve the purpose of the court in freeing the defendant on bond. Furthermore, if this be true, then the fixing a bail in a "specified amount" serves no useful purpose and it substantiates my claim that the "10 percent Rule" is an illusion. I have not yet heard of anyone being re-arrested and brought back into court to face trial, who has forefeited a "10 percent" deposit if the forfeiture of 9 percent of a meaningless bond total, to a court is to be considered as final dispositions of cases for which this type of bail has been authorized by them, then the cause of Justice has not been served, but has been mocked. Such a practice makes it a fraud against the state and the public and is in violation of the spirit of the Law, to say the least.

"The Primary purpose of the bond is not to respond in money, but to insure the presence of the accused before the court as required by his recognizance". Howel vs. Schiele, 85 Opp. 356, 4000 ps 234 54 OL Abs 471, 88NE and 215 Attd 153 OS 235, 41 O Ops 249, 91 NE and 5.

I maintain that the defendant has no more rights before courts of law than do sureties. Sureties must give evidence to the Superintendent of Insurance, of their ability to pay forfeitures, should such forfeitures be levied against them. Either the defendant must give evidence of his capacity to secure the remaining 90 percent of his bond; pay the full amont of the bond in cash or the amount of bail should not be stated as a "specified amount" and treated by the courts as a lesser amount. The Courts should be required to cease and desist deluding the public into believing they are doing something that they are actually not doing.

What is wrong with the bail system other than what I have said about the administration of the "10 percent Rule", really nothing. The problems that are being experienced with the bail system stem from 100 percent lack of responsibility and negligence by official charged by Ohio Statute with its administration, the clerk of court. It is his responsibility to qualify the surety. By the same authority, he can disqualify the surety if he fails to perform his agreement by not paying his forfeiture when they have been levied against him by the court. Thus he can suspend the surety's operations in his court, and by so doing, thus suspend the operations of all Bonding Agents for that surety. Because the surety's agents can only do what the surety can do for himself. This then will eliminate "Judge Shopping". A judge by his own action cannot lift the suspension, because he did not impose it, nor did he have authority to do so. The clerk of court can lift the suspension of the surety, which in turn serves to requalify all his agents. The surety can bring an action at court against the clerk of court to have his rights and privileges restored. In this case, the trial judge would have the power to lift the suspension at his discretion. Continuances, in criminal cases are covered by Section 2937.21 Ohio Revised Code. I'm sure that a clear representation of court policy, in court where there is more than one judge, would eliminate "Judge Shopping" for purposes of continuing suits in forfeiture beyond what is reasonable. Judges should not usurp the authority of the clerk of court by taking over the administration of the bonding system as his personal private domain. These matters have to come before him in the legal process of the law. Should matters come to litigation, he cannot serve as accuser and Judge in his own court. He who has forfeited is the defendant—the clerk of court, the plaintiff for the state—the prosecutor prosecutes the case before the Judge who presides over the court. Each has his function. Try it. It's the law. The mess will be cleared up over night, and you don't even have to thank me.

Any public official or his employees against whom allegations of supplementing his income, by taking payments in exchange for using his position, office, or employment in public trust to grant special favors, or to commit wrongful acts, should be immediately dismissed or whatever action as may be necessary should be taken. The prosecutor knows how this should be done. If he won't do it, then get someone who will. Just follow the instructions in the law.

The giving of small tokens of consideration in appreciation of cooperation between peoples who work together to aid each other in getting their tasks accomplished, particularly during the winter holiday seasons, is in the American tradition and typifies the festive spirit among us all. The giving of a bottle of "booze" to those who like it, a tie tack, box of candy, a fruit cake, etc., does not, in my opinion carry with it the connotation of reciprocity by the granting of special favors on the part of the recipient. I see not justification for public ridicule of those who participate in the practice.

Anyone who permits another to sign his name assumes the responsibility for whatever the signature is signed to. Personally I follow My Dad's advice. He told me I had a couple of things that I should be very careful when I put. One of them was my name. I'm the only person I permit to sign it. The Plain Dealer tried to make a public issue out of what appeared to be a routine practice. Shame on you.

In brief, everything I have told you is covered by the law. Defendants have the right to bail and they have a right to have others make it for them. Qualified Sureties have a right to post bail bonds. Bonding agents are the agents of sureties, their principals. The Superintendent of Insurance prequalifies the sureties. The clerk of court can be held liable if he is negligent. The clerk of court is responsible to qualify sureties in his court; he can also suspend those whom he qualifies. The clerk of court has recourse at law to all its processes in his efforts to collect his forfeitures. Sureties have the right to surrender their bail. Sureties have the right to pursue after, apprehend, arrest their principals in any state in the United States. Sureties may return principals across state lines without reverting to extradition. The contract between the defendant and his bail is a private one between them and of no concern to the court. Sureties may use all reasonable force necessary to return their principal. Sureties may act for themselves or have agents to act for them. All these things are provided for under Federal Law. Sureties may defend themselves in court through counsel or for themselves. Sureties have the same rights before the courts as any other person in the world. Everything pertaining to the Bail System with the exception of the "10 percent Rule" is covered by statute in the Revised Code of the State of Ohio.

The Bail System of Courts in the city of Cleveland can be operated just as efficiently, and cleanly as it is in any other court in the State of Ohio. All that is necessary for them to do is follow the instructions in the Law. No reform is necessary.

As for the Cleveland Plain Dealer, there is no necessity for you to assail the Superintendent of Insurance or the legislature to impose new laws and restrictions on the legitimate activities of people who are conducting their business in a legitimate manner.

In summary let me say that while I will concede that in isolated cases, a bondsman may abuse his friendship with an elected official, I won't deny that in isolated case such quid pro quo situation might exist. It is the exception rather than the rule. I personally have never been so involved nor would I know how to go about initiating such an arrangement. I've been hit on a time or two by minor officials, but I have always acted as though they were joking, or else as though I didn't understand their meanings. I further admit that not all bonding agents wear their collars backwards nor belong to elite country clubs or jet sets—occasionally you may find one who has a past that he wished we and everyone else could forget. The fact that these very few people exist in our industry, as they do in all industries and businesses, gives the Plain Dealer no right to indict the entire industry. That members of a Cleveland bonding agents family have been accused of, indicted for, or convicted of unlawful acts is not justification for the Cleveland Plain Dealer to attempt to have the reading public believe that all people in the bonding industry are also guilty of like offenses. Yet this you have done, without having full knowledge of how the bail system is set up to function, who is responsible to see that it does so function, according to law, and without full knowledge of how the system works in courts outside of metropolitan Cleveland. You have deliberately, willfully, and maliciously, through the publications of the articles by your equally uninformed reporters, lead the reading public to believe the entire fault for the problems of the bail system are heaped upon the heads of all bonding agents. You have made further mischief by advocating in the pitiful, asinine, bleating editorial in the Sunday, August 10th edition, that the City Council of Cleveland join with you in furthur chastisement of bonding agents. You advocate the revokation and the denial of the defendants constitutional rights to "either make his bail or have some one do it for him", by having the courts declare it "unlawful" for a bonding agent to assist the defendant make a "10 percent bond", which is not in itself a law, but a rule that is being illegally administered.

A Corporate Surety is licensed by the Ohio State Department of Insurance. The Bonding Agent is an Insurance Agent licensed by the State of Ohio through the Corporate Surety for whom by he is legally designated their agent. This is private contract and of no concern to the City of Cleveland.

You demand his fees be regulated and a full disclosure of all his costs. Fine. But when you do, be damn sure you make the same requirement of each and every business in the City of Cleveland. Doctors, lawyers, retail and wholesale merchants, all other types of insurance agents, real estate firms, owners, and publishers or newspapers, etc. Otherwise, you are talking about Class Legislation affecting less than 100th of 1 percent of the business people in Cleveland. You furthur advocate that Bonding Agents be prohibited from the Justice Center. That is a public building. The Justice Center is the heart of their business. They must examine court records affecting their business. Bonds must be posted at the Justice Center with the Clerk of Courts. Their clients are held at the Justice Center. The Constitution gives the defendant the right to talk to his bondsman to arrange his bail. I note you make no mention of barring attorneys with regards to court records and clients. Try getting attorneys barred from the Justice Center, Mr. Dogodder. Everyone who has business in a Public Building should have sense enough to deport themselves with propriety and in accordance with the accepted rules of behavior in a civilized society. An individual who doesn't behave himself should be called an account. It is not recommended that everyone, gathered there for a like purpose, should be barred from access to the building.

Judge Frederick Coleman can verify to you that during our years of military service together, that I never critize without recommending a better way. To do so in this instance would please me in the same position as I find you—an untenautable? One. So here goes.

1. The bail system needs no reform. It only needs to be properly administered in accordance with the law. The law is there to cover every situation. Research it and then follow it. Don't read anything into it, take from it, or add to it. If you do, that's when you get into trouble.

2. Let those judges who have assumed personal and absolute control over "bondsmen" and have intimidated and usurped the authority and powers of the Clerk of Court unto themselves, return that authority and power to the Clerk of Court. If the judge adjudicated a forfeiture against a surety or against an individual defendant, it is the duty of the Clerk of Court to supervise its collection. The judge cannot bring the suit for foreclosure or collection. He cannot be the accuser and the judge at the same time in his own court. If the Clerk of Court suspends the privilege of the surety to post bonds in his courts for failure to pay a forfeiture, that serves to suspend all of the surety's agents. Since the Clerk of Court is the one authorized to invoke the suspension, not the judge, then the suspension can only be lifted by him. It is an administrative matter and not a judicial matter, unless it is come before the court in the form of a suit filed by the suspended surety or the Clerk of Court. This in accordance with the law and will eliminate the possibility of "judge shopping" as the Plain Dealer puts it. Sounds simple and it is simple.

3. The 10 percent Rule. All courts should either:

a. Eliminate the use of the 10 percent Rule or take the courts out of the commercial bonding business, or

b. Return the entire deposit to the accused or the depositor upon satisfactory performance of the purpose for which the bond was posted, and

c. Do not deny the defendant his constitutional right to make the cash deposit himself or have someone make it for him. (Note: the word someone is not be qualified by any exceptions.)

4. If a "10 percent bond" is taken, then the Rule provides that the "judge or magistrate shall set a bond". If the cash 10 percent deposit is made, then the remaining 90 percent of the bond amount so fixed, should be collateralized by such additional signatures, or by the assignment of such assets of the defendants, or of others desiring to join with him in making the bond, as to satisfy the clerk of court that in the event of forfeiture of his bail by the defendant, that the collateral thus offered is sufficient to satisfy the demands of the remaining 90 percent and that it can be reduced to judgment and levied upon to satisfaction of the State of Ohio. (Some courts merely require the defendant to sign unsecured bond for the additional 90 percent. Other courts require no more evidence of debt than the 10 percent deposit.) While there have been forfeitures of this class of bail bonds, I know of no instance where the courts have made any effort to collect the balance of the forefeiture. This has resulted in the loss of thousands of dollars to the State of Ohio. This is the baliwick of the State Auditor.

5. The Constitution forbids the use of bonds for punishment. They also prohibit the imposition of restrictions on bonds that make it impossible for the defendant to make the bond. Such impositions as $1,000.00 cash only, $2,500.00 cash only, $5,000.00 cash only, $10,000.00 or $25,000.00 cash only, are excessive and serve to deny the defendant his right to bail, and to punish him by keeping him in jail. The Constitution guarantees the defendant his right to bail and his right to have another make his bail for him if he cannot do it himself. If the court customarily is satisfied with the performance of the surety, and the surety is willing to post the bond, and the cash only restriction denies the surety the right to make the bail, then the defendants constitutional rights are being violated and he is being unlawfully detained. I suggest this practice be discontinued, and these matters discussed at Judges regular meeting. Reasonable bail should be set.

6. Whether the courts admit it or not, Bonding Agents, with clients out on bail, are ex-officio-officers of the court. Rather than treating them with contempt, try treating them as fellow workers that are performing a service to the court, to their communities, and to their clients. Bonding Agents can be of valuable help to the court and I'm not talking about unlawful activities. We have enough trouble trying to make a living as it is. The fact that Cleveland is in a mess is not the fault of Bonding Agents outside the City of Cleveland. Nor can you classify all the other courts in the State of Ohio as being in the same mess as Cleveland courts, and therefore, take it upon yourselves to demand that they come under more restrictions and regulations.

To clean up the mess, all that is really necessary for you to do is to show what I have written to your court officials. They are lawyers. I am not. I don't expect them to agree with everything I have said nor with my analysis completley. Nevertheless, they cannot dispute the law nor the fact that it exists. Neither can they deny that what they are doing now isn't working. Something is wrong. Legitimate Bonding Agents agree with me. Equality before the law is the motto of the courts. Do what the law says, not what some minor official thinks is "the way it should be". Try it. It will work!

Let me tell you this one little parable apropos to the Plain Dealer and Court officials handling of this matter. When I was a young boy, I worked for a farmer who was possessed of a very violent temper and was a very unreasonable man. He was always hunting someone or something, to blame and punish for his misfortunes. One summer day he was mowing the orchard. I was picking up dead branches so they would not foul the cutter bar. As he passed under a tree, and ducked to avoid a low hanging branch, he didn't quite make it and his straw hat was knocked off. He stopped his team, took the buggy whip from its socket, walked back, jumped on his straw hat and flailed hell out of it with the buggy whip.

This is akin to what the Cleveland Plain Dealer has done to Bonding Agents throughout Ohio who have had nothing to do with the alleged mess of the Cleveland Courts Bail System.

I have lectured before civic groups, private organizations, and college campuses about bail bonding. It is a facet of the Justice System that is much talked about and little understood. These agents can and will help you educate the public concerning the system and how it works. They will help your community in many other ways also. All that is necessary is to treat them like the businessmen they are, and point out to them what you would like to see accomplished and ask them to help. Don't be surprised when they accept. As to the Plain Dealer, if you people want to crucify somebody, or find it necessary to resort to sensationalistic type journalistic efforts, make sure you have all your facts marshalled. Inuendos, insinuations, and wholesale indictments of whole group of people for the alleged wrongs of a very few, constitute slander and defamation of character of those who have done no wrong. Such actions, on your part, could result in a more positive and exciting reaction than the passive rebuttal, to your attack, which I have submitted.

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American Bar Association,
*Washington, D.C., October 29, 1981.*

Hon. Jeffrey Harris,
*Deputy Associate Attorney General,*
*U.S. Department of Justice, Washington, D.C.*

Dear Mr. Harris: I read with great interest your October 21, 1981 statement concerning bail reform on behalf of the United States Department of Justice before the Senate Judiciary Committee's Subcommittee on The Constitution.

Because bail and fair and effective systems for the administration thereof are dealt with at length in Chapter 10 (Pretrial Release) of the ABA Standards for Criminal Justice, this is a subject of vital interest to the Association.

Indeed, official ABA representatives have spent a good deal of time in the recent past testifying before the Congress on a variety of bail reform bills. In part, our recent official testimony touched upon ABA policies regarding the use of monetary conditions and the abolition of compensated sureties.

On page 29 at footnote 23 of your testimony, you indicate "We are also aware of the suggestion that surety bond be abolished, as has been recommended by, among others, the American Bar Association in Standard 10-1.3(c) of the Standards on Pretrial Release." The American Bar Association does not recommend the abolition of surety bond. It recommends the abolition of compensated sureties. This matter is touched upon in passing at Standard 10-1.3(c) and in greater depth at Standard 10-5.5 (Compensated sureties). Finally, Standard 10-5.4(d)(iii) makes clear that under certain circumstances uncompensated sureties may be utilized.

While your reference to the ABA policy at page 29 of your testimony was perhaps minor I did wish to clarify the official policy of the American Bar Association as enunciated in our Second Edition Standards. Because the subjects of monetary conditions, surety bond and compensated sureties were addressed in the Association's testimony before the Subcommittee on The Constitution, a copy of this letter has been addressed to Senator Orrin Hatch and directed to the attention of Mr. Randall Rader, Counsel to the Subcommittee.

Sincerely,

Richard P. Lynch, *Director.*

## REDUCING CRIME AND DETENTION THROUGH PRETRIAL SERVICES

(By Senator Joseph R. Biden, Jr.)

Violent crime is one of the most serious problems facing America today. Thirty percent of the nation's households were touched by crime at least once in 1980. At least 6 percent of all households were touched at least once by violent crime—rape, robbery, or assault. Americans are not insulated from crime by race or by where they choose to live—30 percent of white households and 32 percent of black households were victimized. Crime touched 34 percent of urban households, 32 percent of suburban households, and 23 percent of rural households.[1]

There are many causes of violent crime—drugs and social, economic, and educational inequality are among the most important. In the past, the federal government has responded to violent crime with slogans and rhetoric or blindly throwing money at perceived causes. The failure of those efforts has taught us that we must approach crime in a more realistic and practical way. At the federal level, we must calmly assess what is needed and the specific impact of programs and reforms on the incidence of crime. We must also balance the cost of each proposal against its likelihood of success.

An excellent example of responsible federal action to reduce violent crime is the response to the problem of crimes committed by persons released on bail. The problem has been studied carefully, and a proposed solution—pretrial services—has been tried, tested, and found to reduce crime on bail. Now Congress is proposing that the demonstrated success of pretrial services merits its expansion to all federal districts.

Crimes committed by persons released on bail have been the focus of intensive study on the federal level since 1969, when then-Attorney General John Mitchell told the House Judiciary Committee that crime committed by persons free on bail was a "major factor in the rising crime rate." Following extensive hearings, then-Senator Sam Ervin (D-N.C.) identified two sources of the problem.

First, the longer the period of time before trial, the more frequent and serious a second crime was likely to be. His proposed solution became law in Title I of the Speedy Trial Act of 1974 [2] which sets a schedule of time limits in the which the federal courts must dispose of criminals cases.

Second, Senator Ervin found that Congress failed to provide judges with the information and assistance essential to carry out the purposes of the Bail Reform Act of 1966.[3] A Senate report summarized the problem:

"[I]t is common knowledge that many federal judges are reluctant to release defendants pursuant to the act and all too often when they do, defendants either commit subsequent crimes or become fugitives. This situation exists because district courts do not have personnel to conduct interviews of arrested defendants so that judges can make informed decisions as to whether to release defendants. Furthermore, outside the District of Columbia, there is no agency charged with supervising bail conditions for defendants released prior to trial. Therefore, even if a defendant is released on his own recognizance prior to trial on a condition set by the judge, for example that the defendant refrain from associating with certain persons or that he not use narcotic drugs, there is no agency charged with assuring compliance with the judge's order." [4]

Senator Ervin concluded that federal judges should be provided with the information necessary to make an informed bail decision and that individuals released on bail should be supervised. Congress implemented those proposals in Title II of the Speedy Trial Act of 1974.[5] Title II of the Speedy Trial Act of 1974 established demonstration pretrial services agencies in 10 representative federal judicial districts. The 10 districts were chosen by the Chief Justice upon consultation with the Attorney General on the basis of the number of criminal cases in the district, the percentage of defendants detained before trial, the incidence of crimes charged to persons released prior to trial, and the resources available.

The primary functions of the agencies are to:

(1) collect, verify, and report promptly to the judicial officer all information pertaining to the pretrial release of persons charged with an offense and recommend appropriate release conditions;

(2) review and modify the reports and recommendations;

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[1] The Prevalence of Crime. Bureau of Justice Statistics, U.S. Department of Justice, Washington, D.C. (April 7, 1981).

[2] Public Law 93-619, 88 Stat. 2076, 18 U.S.C. 3152 *et seq.*

[3] Bail Reform Act of 196, Public Law 89-465, 80 Stat. 216, 18 U.S.C. 3146 *et seq.*

[4] Senate Report No. 97-77, 97th Cong., 1st sess. (1981) at 2.

[5] 18 U.S.C. 3152-3156.

(3) supervise and provide supportive services to persons released in their custody; and

(4) inform the court of violation of conditions of release.

Five of the district agencies were administered by boards of trustees because the highly successful District of Columbia Bail Agency, which was the original model for the demonstration programs, had a similar form of administration. Those districts were: Western Missouri—Kansas City; Eastern New York—Brooklyn; Eastern Pennsylvania—Philadelphia; Maryland—Baltimore; and Eastern Michigan—Detroit.

The remaining five districts were supervised by the US Probation Service because the House of Representatives determined that existing probation offices should provide pretrial services. Those districts were: Central California—Los Angeles; Northern Georgia—Atlanta; Northern Illinois—Chicago; Southern New York—New York City; and Northern Texas—Dallas.

The director of the Administrative Office of the US Courts released the Fourth Annual Report on the Implementation of Title II of the Speedy Trial Act on June 29, 1979. Table I reflects the findings on the performance of the two types of districts from the first reporting period (1975-1976) to the last reporting period (1977-1978).

### TABLE I

[In percent]

| | First period | Last period | Net change |
|---|---|---|---|
| 1. Rates of prebail reports submitted: | | | |
| Boards | 64.4 | 87.2 | +35 |
| Probation | 70.5 | 74.5 | +5.6 |
| 2. Rates of bail recommendations submitted: | | | |
| Boards | 59.9 | 79.6 | +32.8 |
| Probation | 59.8 | 60.9 | +1.8 |
| 3. Rearrest rates: | | | |
| Boards | 7.0 | 3.4 | −51.4 |
| Probation | 9.1 | 4.5 | −50.5 |
| 4. Failure to appear rates: | | | |
| Boards | 3.8 | 3.4 | −10.5 |
| Probation | 6.8 | 2.4 | −64 |
| 5. Initial release rates: | | | |
| Boards | 71.9 | 76.9 | +6.9 |
| Probation | 65.1 | 65.5 | +0.6 |

In a relatively short period of time the demonstration pretrial services agencies met the objectives of assisting the judicial officers in making informed bail decisions and supervising persons released on bail, thereby reducing the number of crimes committed by persons released on bail. In addition, pretrial services has resulted in an increase in the number of defendants who appear for trial and a decrease in unnecessary pretrial detention.

As chairman of the Senate Judiciary Committee subcommittee on criminal justice in the 96th Congress, I directed the subcommittee to conduct an investigation to determine first, if pretrial services should be expanded beyond the 10 demonstration districts and second, the most effective and efficient means of providing pretrial services.

Expansion of pretrial services beyond the 10 demonstration districts received widespread support. The Administrative Office of the US Courts, the Judicial Conference of the United States, the American Bar Association, the American Correctional Association, the National Association of Counties, and the National Advisory Commission on Criminal Justice Standards and Goals all recommended that mechanisms be established for providing pretrial services in all jurisdictions.

The subcommittee received further support for expansion of pretrial services programs in the testimony of federal judges, chief probation officers, chief pretrial services officers, and United States attorneys who had experience with the programs in the 10 demonstration districts.[6]

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[6] Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, U.S. Senate, 96th Cong., 2nd sess. on S. 2705, Pretrial Services Agencies (May 13, 1980).

The overwhelming support for expansion of pretrial services led the subcommittee to consider the most effective and efficient means of administering the services, with primary focus on the alternatives of existing probation personnel or administration separate from probation. According to the study conducted by the Administrative Office of the U.S. Courts, both forms were successful, with the nonprobation-run agencies doing somewhat better.

In addition, subcommittee witnesses testified that while federal probation personnel may have the time needed to perform pretrial services due to declining federal caseloads in some districts, probation officers might not satisfactorily perform pretrial services because "the attitudes, policies and procedures required to assure that the accused's rights are not violated must be delicately balanced with the need for protection of society and the timely court process. The attitudes, policies, and procedures required to make sentencing recommendations and supervise convicted offenders on probation are different; the former is based upon a presumption of innocence with its concomitant presumption of release on recognizance while the latter is based upon a final determination of guilt where the burden on the defendant to justify release into the community is greater."[7]

The cost of providing pretrial services was another very important consideration in determining whether the services should be provided and the appropriate form of administration. The Congressional Budget Office (CBO) estimates that providing pretrial services in every judicial district will cost some $18 million.[8] The cost is the same regardless of the form of administration.[9] The significance of the cost can be determined by also considering savings to the community from reduced crime on bail as well as the savings to the criminal justice system from a reduction both in unnecessary detention and in the fugitive rate.

### PRETRIAL SERVICES ACT OF 1980

All of this information led to the introduction of the Pretrial Services Act of 1980 (S 2705), which I sponsored together with Senators Mathias (R-Md.), Kennedy (D-Mass.), and Thurmond (R-S.C.). The bill provides for pretrial services in all federal judicial districts. To ensure that existing personnel are used whenever they are available and appropriate, the bill provides for probation officers to run the programs for the first 18 months. Thereafter the district court and circuit judicial council may jointly recommend the appointment of a chief pretrial services officer to administer the program if it appears that existing personnel cannot perform the services. The bill further provides that existing personnel would provide pretrial services whenever possible regardless of the form of administration.

The Pretrial Services Act of 1980 passed the Senate in the 96th Congress. In the current Congress, the Senate Judiciary Committee voted unanimously in favor of the legislation (S 923), and it passed the Senate on June 18, 1981. The House Judiciary Committee has reported similar legislation, and that legislation is now awaiting consideration by the full House of Representatives.

When this legislation is enacted into law, the federal government will have taken one important step in meeting its responsibilities to reduce the incidence of crime. The legislation is significant because it is not simply a pie-in-the-sky program with little real impact on the crime rate. Pretrial services have proven effective.

Establishing pretrial services in every district will not be the end of Congress' responsibility to reduce crime on bail. W know, for example, that increased pretrial supervision will not decrease the likelihood that some types of defendants will commit subsequent crimes while on bail. Therefore, Congress will soon consider proposals which will authorize judges to consider whether certain defendants pose such a great danger to the community that preventive detention is necessary. Drug traffickers, for example, are likely candidates for preventive detention since, as Attorney General William French Smith recently announced, there are currently some 2900 drug dealers who are fugitives—three for every Drug Enforcement Administration agent. In its deliberations on these proposals, Congress must ensure that the effort to provide greater protection for the community also protects the right to due process and presumption of innocence for accused persons.

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[7] Ibid., p. 3.

[8] Senate Report No. 97-77, *supra* note 4, at 15.

[9] *Ibid.*, p. 5.

# THE RIGHT TO BAIL : A HISTORICAL INQUIRY

*by William F. Duker**

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## INTRODUCTION

The great English legal commentators tell us that inherent in the common law is a profound regard for a man's personal freedom.[1] Nevertheless, imprisonment is imposed under the premise that some good for society will be produced.[2] To suggest that there be an absolute exemption from imprisonment under all circumstances would be incongruent with every notion of law and political society, and in the end would be destructive of all civil liberties.[3] Therefore, only those incarcerations which arise from absolute necessity are just. "Every act of authority of one man over another, for which there is not absolute necessity is tyrannical."[4] These principles are not only the spirit of the common law, but the very foundation upon which American political philosophy rests.

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* B.A. (Dec. 1975) State Univ. of New York at Albany; Ph.D. (candidate) Cambridge University, England.

[1] T. WOOD, AN INSTITUTION OF THE LAWS OF ENGLAND 16 (1722).

[2] J. BENTHAM, *Leading Principles of a Constitutional Code for Any State*, in WORKS 272 (1838).

[3] 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (4th ed. 1770).

Beyond embracing the English concepts of individual liberty, the United States has given life to these abstract concepts by employing the instruments of Anglican justice. Bail is one such instrument.[5] What follows is a history of the right to bail.

Although the focus of this article is the right to bail in the United States, it is necessary to commence with an examination of the origin of bail in England and to trace its development through the seventeenth century. This part of the study is not only of antiquarian interest, but illustrative of a basic characteristic of the right to bail more striking perhaps than any other, *i.e.*, the right to bail like liberty itself is a product of continuous development. In addition, this section is required because earlier writers either have found it unnecessary to search out bail's origins or have found it necessary to perpetuate the myth that the system of bail developed primarily to protect the liberty of "the subject."

The study of bail in the United States begins by analyzing the purpose of bail. Following this section will be an examination of the notion of suretyship. The juxtaposing of these two sections is intended to highlight the duel function of bail — a system which balances the interests of the individual and those of the state. Finally, a study of the constitutional and statutory provisions which regulate the system of bail in the United States, while revealing an increased regard for the rights of the individual, will nevertheless indicate that there is no constitutional right to bail.

## PART I

## BAIL IN EARLY ENGLAND

### I. ORIGINS

In an attempt to analyze the development and operation of the system of bail as regulated by the United States Constitution and statutes, one is driven retrogressively to the antiquities of law in England.[6] In the dawn of

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[4] M. DEBACCARIA, AN ESSAY ON CRIME AND PUNISHMENT 7 (1768).

[5] For the purpose of this work, "bail" shall be given a circumscribed meaning: simply, a security for the appearance of an individual before a judicial body. Briefly, however, in the early sections, it is necessary that the parameters of this definition be violated, since the origin of bail for appearance is tied inextricably to the notions of surety for payment and pledge for good behavior.

[6] "The right to be bailed in certain cases is as old as the law of England itself. . . ." 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 233 (1883); *see* Pollack, *English Law Before The Norman Conquest*, 14 L.Q. REV. 291 (1898), in which the eminent historian of English law observed:

> For most practical purposes, the history of English law does not begin till after the

social organization, the rule of law was simply, "an eye for an eye; a tooth for a tooth." Upon the transgression of a perceived right, the wronged party became the agent of justice, or retribution. If a murder were committed, the victim's next of kin became the avenger.[7] The "state" gradually moved to eliminate the "blood-feud." The first important encroachment upon this primordial institution was the establishment of a system of compensation, or "wergeld," (the value set upon a man's life and bodily faculties in accordance with his rank in society, and paid as compensation for injury or death).[8] In the latter part of the seventh century, the state intervened directly in the new and more orderly procedure by creating "courts" of arbitration. The laws of Kings Hlothaere (673-685 A.D.) and Eadric (685-687 A.D.) provided that if one man initiated a complaint against another, the accused must give "borh"[9] (surety) and make any retribution prescribed by the judicial officer.[10] If the action were settled in favor of the complainant, the compensation procedure commenced. "Wergeld" did not have to be paid immediately; payment could be deferred, and satisfied in installments, upon the oath of the second party.[11]

The laws of Hlothaere and Eadric also established the first mandatory, prearranged and perpetual "borh" rules. They applied to only a limited class: servants were placed under the "borh" of their masters,[12] and foreign visitors were placed under the "borh" of their hosts.[13] Just as the surety today is expected to guarantee the appearance of a defendant at trial, a "borh," or pledge, warranted the presence of the accused before a judicial tribunal to answer charges and insured the payment of "wergeld" if the accused were found guilty.[14]

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> Norman Conquest, and the earliest things which modern lawyers are strictly bound to know must be allowed to date only from the thirteenth century, and from the latter half of it rather than the former. Nevertheless a student who does not look farther back will be puzzled by the relics of archaic law which were not formally discarded until quite modern times, and he may easily be misled by plausible but incorrect explanations of them, such as have been current in Blackstone's time and much later . . . . The extreme antiquities of our law may not be often required in practice, but it is not safe to neglect them altogether, and still less safe to accept uncritical explanations when it does become necessary to consider them.

[7] *See* 1 P. VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 309 (1920).

[8] For an example of the hierarchical differentiation of "wergeld," *see* LEGES HENRICI PRIMI §§ 76(3a), 76(4), 76(4a), 76(4b), at 239. (L. Downer ed. 1972) [hereinafter cited as Downer]. The laws of King Ethelberht (560?-616 A.D.) are virtually a table fixing the value of the lives of the different classes of the community and the amount to be paid for the loss of various limbs and bodily faculties. *See* 1 ANCIENT LAWS AND INSTITUTIONS OF ENGLAND 3-25 (B. Thorpe ed. 1840) [hereinafter cited as Thorpe].

[9] "Borh," here, is a synonym for the noun "bail."

[10] Section 9 continued, "[b]ut if he refuses to give 'borh,' let him pay xii shillings to the king, and let the suit be as open as it before was." Thorpe, *supra* note 8, at 31.

[11] *Id.* § 10, at 31-33.

[12] *Id.* §§ 1-2, at 27-29.

[13] *Id.* § 15, at 33-35.

[14] E. DEHAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275, at 4 (1940) [hereinafter cited as DEHAAS].

The general purpose of the early Anglo-Saxon code was to restrain private vengeance until resort could be had to a public tribunal. King Ine of Wessex (688-725 A.D.) ordained, "If anyone exacts redress, before he pleads for justice, he shall give up what he has taken, and pay as much again, and thirty shillings compensation."[15] Naturally, because the compensatory "wergeld" system replaced the simple rule of vengeance embodied in the "blood-feud," it was necessary that the kindred become engrossed in the new order.[16] The surety was not, however, limited by law to the "maegth" (immediate family). Guildbrethren as well as maternal and paternal relations shared the benefits as well as the burden of the "wergeld" system.[17] Edward's laws (901-924 A.D.) recognized that friends or acquaintances could act as "borh." Further, they also allowed satisfaction of the surety requirement through the use of the property of the accused. If one had neither property nor other "borh," he was to be held until judgment.[18]

In Ethelstan's Ordinances (924-960 A.D.), the "borh" system was extended beyond the interval between accusation and trial to include the period after trial and incarceration.[19] The system thus functioned not only as bail, but as a means of probation. One who was unable to secure "borh" during the post-conviction period was to "be brought into prison . . . and delivered out as it [was] . . . ordained."[20] If one could not secure "borh" and there were no prison, the individual could secure release by taking an oath for future good behavior.[21] (One wonders about the fate of an individual whose word was tainted and who resided in an area where there were no prisons.) During the reign of Ethelstan, the *Ordinances of the Bishops and Reeves of London* provided that commission of an offense while in "borh" was punishable by death.[22] Finally, contemptuous men were also placed under sureties.[23]

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[15] THE LAWS OF THE EARLIEST ENGLISH KINGS 39 (F. Attenborough ed. 1922) [hereinafter cited as Attenborough].

Ine's laws further provided for the establishment of a strict contractual relationship between the accused and the surety. One who had insufficient pledge, *i.e.*, property, to guarantee his own appearance, could seek pledge from another "as he may be able to arrange, on condition that he give himself into his hands, until he can make good his pledge." If the indebted person were accused on another charge while in "borh," and again compelled to provide pledge, the "borh" in the first action was required to support him in the second case also, or forfeit his pledge in the first case. Thorpe, *supra* note 8, § 62, at 141-43.

[16] Thorpe, *supra* note 8, at 9. Section 23 of the Laws of Ethelberht provided, "[i]f the slayer retire from the land, let his kindred pay a half 'leod'."

[17] Thorpe, *supra* note 8, § 27, at 79.

[18] *Id.* § 6, at 163.

[19] *Id.* § 1, at 199-201; § 6, at 206.

[20] *Id.* § 7, at 203-05.

[21] *Id.* § 2, at 243.

[22] *Id. Judicia Civitatis Lundonie* § 4, at 229-31.

[23] Attenborough, *supra* note 15, §§ 20-20.1, at 137.

> And if anyone fails to attend an assembly three times, he shall pay the fine due to the king for insubordination. And the meeting of the assembly shall be announced seven days before it is held. If, however, he will not comply with the law, and pay the fine for insubordination, then all the chief men, who belong to the borough shall ride [to his house] and take all that he owns, and place him under surety.

During the reign of Edgar (959-975 A.D.), a striking development in the "borh" system was effectuated. Edgar converted the heretofore extraordinary relationship into a universal affiliation. Ordinances demanded that "every man . . . [was to] have a 'borh.'"[24] If the ward were accused of a crime, the "borh" was to bring his ward to every justice. The code of Edgar further ordained that "if any one then do wrong and run away, let the 'borh' bear that which he ought to bear."[25] In other words, surety and principal were bound "body for body."

Ethelred (978-1016 A.D.) continued the requirements that "every freeman have a true 'borh.'"[26] If the accused absconded and avoided the trial, his "borh" was required to pay "the accuser his 'ceap-gild' [compensation for stolen goods], and to the lord his 'wer' [synonymous for "wergeld"], who is

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Under Ethelstan, the "borh" system was supplemented by the creation of hundreds and tithings (local organizations of 100 (10 tithings) and 10 men respectively). *See* note 28 *infra*. At this time, there was no immediate connection between these organizations and the "borh" system. They are often confused with the "borh" system due to the possible amalgamation of "borh" and tithings in the later Anglo-Saxon period and because, initially, the two orders were pursuing identical ends: the former system in its responsibility of presentment, sanctioned by grievous penalties for failure; the latter in its duty to arrest. The only functions of the tithings and hundreds concern matters of finance and police. Attenborough, *supra* note 15, § 5, para. Second, at 159:

> We have declared that each one of us shall annually contribute four pence for our common benefit; and we shall pay compensation for property which is stolen after we have made our contributions; and quests [for missing property] shall be carried out by all of us together. And everyone shall pay his shilling who has property which is worth thirty pence, except poor widows who have no land and no one to work for them.

Paragraph Third continued:

> We shall always count ten men together, and the chief man shall see that the [other] nine shall discharge all the dues which we have all agreed upon; and then [we shall count] them in groups of a hundred, with one official for the hundred who will admonish those ten [Chief Men] for the common benefit of us all. And these eleven shall keep the money of the hundred-group and an account of what they disburse when money has to be paid; and again, of what they receive when money accrues to us through a plea we have made in common. And they shall see to it also that each of those dues is forthcoming on which we have all agreed for our common benefit, on penalty of thirty pence or one ox; that everything may be fulfilled, which we have declared in our ordinances, and which stands in the terms of our constitution.

*See also id.* §§ 4-5, 7-9, at 159-67. The line between the "borh" and tithings and hundreds seems to have grown thinner in the reign of Edgar, before disappearing during Cnut's reign. *See* notes 24-28 and accompanying text *infra*.

[23] It has been suggested that the guardianship of another filled the vacuum ensuing from primitive society's absence of a policing agent. DEHAAS, *supra* note 14, at 18.

[24] Thorpe, *supra* note 8, § 6, at 269.

[25] *Id.* § 1, at 281-83. Due to the contradictory laws in the code, there is considerable confusion over this point. *E.g.*, *id.* § 4, at 283-85, states, "[a]nd if there be any man who is untrue to his people, let the king's reeve go and bring him under 'borh'; that he may be led to justice, to those who accuse him. But if he had no 'borh', let him be slain . . . ." Section 17 (similar to § 12, cl. 2 of *Judicia Civitatis Lundonie*, *supra* note 22), however, merely required him who could not find "borh" to "swear that he will never, neither steal, nor bear any cattle, nor avenge his punishment." Thorpe, *supra* note 8, § 17, at 333. In the case of § 12, cl. 2 of *Judicia Civitatis Lundonie*, it is possible that a different system was in effect in London, traditionally a legally privileged area. A possible explanation for the first example is given at note 28 *infra*.

entitled to his 'wite' [fine]. . . ."[27] It was further provided that every lord was to have the whole of his house in "borh," and if any member of the household should be accused and not present himself before the adjudicating body, the lord was to pay the man's "wer" to the king.

The "borh's" responsibility under the laws of Edgar and Ethelred foreshadowed the requirement in Cnut's laws (1017-1035 A.D.) whereby all free men were enlisted in a hundred and a tithing[28] (local governmental units).[29]

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[27] Thorpe, *supra* note 8, § 3, at 281-83. *See also id.* § 6, at 297.

[28] *Id.* § 20, at 387-89, provided:

> And we will, that every freeman be brought into a hundred, and into a tithing, who wishes to be entitled to 'lad' or to 'wer,' in case any one shall slay him after he is xii years of age; or let him not afterwards be entitled to any free rights, be he 'heorth-faest,' be he follower. And that every one be brought into a hundred and in 'borh;' and let the 'borh' hold and lead him to every plea. . . .

The seemingly interchangeable utilization of the words "tithing" and "borh" (which heretofore had overlapping responsibilities) in the above ordinance, suggests a fusion of the two subsystems. Morris, in his exhaustive examination of the frankpledge, however, upon the basis of this very ordinance, disagrees. He suggests that "the mere fact of the otherwise useless repetition proves the contrary." W. Morris, The Frankpledge System 15 (1910). For further dissent with the view endorsed here, but in agreement with the opinion offered by Morris, see DeHaas, *supra* note 14, at 21-24. In point of fact, Morris notes sections 26, 30 cl. 3b, and 33 which, according to Morris, demonstrate that membership in a tithing did not provide a man with suretyship against breach of peace because the very classes of persons for whom a suretyship requirement was most necessary had to find borh for themselves. Section 25 provided:

> And he who is 'tiht-bysig,' and untrue to the people, and avoids the 'gemot' thrice; then let there be selected, from the fourth 'gemot,' those who shall ride to him; and let him still find a 'borh,' if he can: but if he cannot, let them seize him as they can, whether alive or dead, and take all that he owns. And let the accuser be paid his 'ceap-gild'; and let the lord take possession of half, half the hundred. And if one or the other, either a kinsman or a stranger, refuse the riding; let him pay the king 120 shillings.

1 Thorpe, *supra* note 8, at 389.

Section 30 cl. 3b required that the "[t]horoughly untrustworthy" man, who had forfeited the confidence of the hundred by having had charges alleged against him by three men, shall go to the ordeal, and if proven guilty "he shall pay double value to the accuser and his wergeld to the lord who is entitled to receive his fine, and he shall [be] appoint[ed] trustworthy sureties, that henceforth he will desist from all wrong-doing." The Laws of the Kings From Edmund I to Henry I 191 (A. Robertson ed. 1925) [hereinafter cited as Robertson]. If the suspicious person had no surety, he was to "be slain and buried in unconsecrated ground." *Id.* at 193. The wording of the first noted provision ("let him *still* find a borh, if he can" (emphasis added)), might suggest that the "tiht-bysig" individual's "borh" had failed in his responsibility to bring him to the court session, and that a new "borh" was therefore required. Second, the "trustworthy sureties" of section 30 cl. 3b were more likely special sureties, analogous to parole officers, who were directed, not to lead the principal "to every plea" — as was the duty of the bail-"borh" — or even to apprehend the suspect after the commission of a crime — as was the responsibility of the traditional tithing — but to insure that "henceforth he will desist from all wrong-doing," *i.e.*, bail for good behavior. Further, it is possible to read section 33 as merely directing the reeve to insure that the suspicious character was under the direct control of his existing "borh," for it ordered that if "he *has* no surety, he shall be slain. . . ." Finally, note that § 20 of Cnut's laws does not absolutely forbid an individual to be without the hundred or tithing. However, such a person lost many privileges. *See also* § 35 of Cnut's laws, which provided that "if a friendless man or a comer from afar be so distressed, through want of friends, that he has no bail at the 'frum-tihtle'; let him then submit to prison, and there abide, until he go to God's ordeal, and there let him fare as he may . . . ."

The tithing system was continued under Edward the Confessor (1042-1066 A.D.),[30] and when the Normans arrived in 1066, the die had been cast. Upon this surety system, the conquerors constructed the frankpledge.[31] William decreed that everyone who desired to retain the status of a free man was to be in a frankpledge, *i.e.*, a tithing and a hundred, "so that the frankpledge may bring him to justice, if he committed an offense."[32] Each member of the frankpledge was a surety, or "free pledge" for the other members. The frankpledge was thus a collective bail and probation system. It was not so much a device ensuring appearance at trial,[33] but rather a safeguard against anticipated offenses.[34] Membership in a tithing and a hundred, or frankpledge, was required from age twelve.[35] Servants were kept under the jurisdiction of their masters.[36]

The Norman code provided that when a Frenchman was killed and the members of the accused's hundred did not apprehend him within eight days, a special fine was levied against the hundred.[37] This development helps to explain the motivating force behind the establishment of the frankpledge. William had to take drastic steps for the protection of his followers. The tithing and hundred, of course, were not completely novel institutions. What was new, in addition to the fact that the frankpledge functioned as a bail for good behavior rather than a bail for appearance, was the assignment of responsibility to the whole hundred for the offense of any of its members. The reorganization of the English "borh" system by the Normans was prompted, then, by the rebellious posture of the vanquished towards their conquerors.[38]

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The fusion of "borh" and tithing was a natural development. As members of the tithing and hundred, individuals were sworn to help one another. Attenborough, *supra* note 15, § 5, at 165. The "borh" and tithing were composed of approximately the same number of men — the tithing ten, the borh twelve (according to Morris' estimation, about the number of men in a village) — and probably made up, more or less, of the same men. The jurisdiction of both groups, in their most essential function, overlapped: the tithing's responsibility to apprehend those accused of crimes; the "borh's" task of insuring the presence of an accused. Moreover, both groups were tied to the same hundred court, where "[u]nder the influence of this contact year by year, the [once] voluntary and occasional *borh* group became assimilated with the compulsory and regular tithing group." W. MORRIS, THE FRANKPLEDGE SYSTEM 28 (1910) [hereinafter cited as MORRIS].

[29] *See* note 23 *supra*, and text accompanying notes 33-34 *infra*.

[30] Thorpe, *supra* note 8, §§ 19-20, at 450.

[31] *See* note 38 and accompanying text *infra*.

[32] Robertson, *supra* note 28, art. 8, at 241. The article continued, "[a]nd if any such escapes, the members of the frankpledge shall be responsible for the simple payment of what is claimed, and shall clear themselves from [the charge of] any knowledge of fraud on the part of the runaway."

[33] Downer, *supra* note 8, c. 23(1), at 127; *id.* c. 53(1c), at 171; *id.* c. 57(2), at 177.

[34] MORRIS, *supra* note 28, at 2.

[35] Downer, *supra* note 8, c. 8(2), at 103.

[36] Downer, *supra* note 8, c. 8(2a); *id.* c. 8(3), at 103; *id.* c. 41(7), at 149; *id.* c. 59(6), at 185; Robertson, *supra* note 28, *Laws of William the Conqueror*, para. 52, at 275.

[37] Robertson, *supra* note 28, *Laws of William the Conqueror*, para. 22, at 265. *See also* note 32 *supra*.

[38] MORRIS, *supra* note 28, at 35. "In the Norman period it was the local uprisings following the Conquest, together with the State of the peace under which the king found it necessary to

During the period between the Assize of Clarendon (1166) and the Statute of Westminster I (1275) most infractions remained offenses against the individual. Accusation charging crime was, for the most part, still a private matter; although the procedure was coordinated by the rules of the Crown's courts, the plaintiff was master of his own process. Prior to the end of the twelfth century, the "Glanvilian" process,[39] which sought to compel appearance in personal actions through a series of summonses and distraints, was replaced by the process described in Bracton's *De Legibus et Consuetudinibus Angliae*.[40] The primary step in the "Bractonian" process was the writ of summons. If the defendant defaulted on such a writ, the sheriff was ordered to attach him by bail and pledges "that he should appear before our justiciaries at Westminster" on a specified day.[41] If the defendant would not supply pledges, the sheriff would usually distrain him by his chattels.[42] The authority

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take drastic steps to protect Normans from secret assassination . . . ." *Id.* Although it is true that the frankpledge developed from the English surety, it did not function as bail for appearance exclusive of other surety. This can be inferred from an examination of the early Norman laws. Section 3 of the Codes of William the Conqueror stated:

> It is the custom in the province of Mercia, that if anyone, who is accused of larceny or robbery and is under surety to appear before the Court, escapes in the meantime, then his surety shall have respite for a month and a day to seek him and if he can find him within the set time, he shall bring him before the Court, and if he cannot find him he shall swear along with eleven compurgators that, at the time when he took him under surety, he did not know him to be a thief, and that he was not an accessory to his flight, and he cannot find him.

Robertson, *supra* note 28, § 5, at 255.

The clause clearly speaks of one pledge and not borh representation. *See also* note 32 *supra*. The frankpledge was not in operation throughout the realm. *See* MORRIS, *supra* note 28, at ch. II. Further, it did not include all classes of society. *Id.* at ch. III. DEHAAS, *supra* note 14, at ch. II, in an exhaustive case analysis, has shown that it was outside the essential province of the frankpledge to assure an individual's appearance before the court for the latter period (1166-1275) as well. (Although DeHaas proposes to examine the frankpledge system from its institution under William the Conqueror until the Statute of Westminster I, because of the lack of material, her analysis, with the exception of an 1165 case, is based on cases from 1166-1275).

[39] GLANVIL, A TREATISE ON THE LAWS AND CUSTOMS OF ENGLAND, 5-6, 8, 12, 20, 40, 42, 44, 48-49, 63-64, 105, 110, 117, 131, 142-43 (G. Hall ed. 1965).

[40] 6 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 469-81 (Sir Travers Twiss ed. 1883) [hereinafter cited as BRACTON, DE LEGIBUS].

[41] *Id.* at 469. This step is well illustrated by two cases reported by Bracton in his notebook. BRACTON, NOTEBOOK (F. Maitland ed. 1887) [hereinafter cited as BRACTON, NOTEBOOK]. In 1217, in a *quo warranto* action initiated by Roberus de Burgo against Bartholomeum de Hoctona, the defendant failed to answer the court's summons. 3 *id.* pl. 1296, at 306. The following was recorded, "Judicium, ipse attachietur quod sit in Oct. etc." (Judgment, he should be attached so that he appears here in October.) A similar order was issued by the court in the 1233 case of *Hugo Wack v. Margeriam de Feritate* upon the defendant's default. 2 *id.* pl. 796, at 611.

[42] There is an interesting case on the rolls of the King's Court for the year 1229. 13 CURIA REGIS ROLLS 479. There A. de Farrar', the Court of Derby, in an action commenced by Ricardus de Insula, refused to give pledges, and refused to be distrained. When his animals were seized, his men recaptured them. The sheriff was then ordered to distrain the count by his land and chattels so that he would be before the court on a certain day to answer the plea and explain his refusal to find pledges. The sheriff was ordered also to conduct a diligent inquiry into the recapture of the animals by the count's men, and to have those involved before the court to answer for their transgressions.

of the sheriff's office might also be applied against those who were unwilling or unable to find pledges.[43] If the defendant provided pledges and then appeared on the court-day, he was required to explain his failure to answer the court's summons. If he could not excuse himself, he would be amerced for his default.[44] If, however, the defendant continued in default, better pledges were appointed.[45] If the better pledges were successful in bringing the defendant before the court, only the first pledges, and of course the defendant, were amerced. If the better pledges also failed, the defendant and the first and better pledges were amerced, and the duty of securing the reluctant party's appearance was assigned to the sheriff.[46] The sheriff either presented the defendant before the justices, or returned *non inventus est* (*i.e.*, he was not found). If the defendant could not be found, there followed a series of distraints,[47] terminating in outlawry.[48]

The requirement of pledges and better pledges continued to be part of the tedious *mesne* process until 1275 when the Statute of Westminster I was enacted.[49] The statute eliminated all of the steps in the "Bractonian" process between the first attachment and the final — and what now became the grand — distress.[50] Of course, for propertyless defendants, the grand distress provided no sanction. For such defendants, the writ *capias ita habeas corpus* was instituted in the mid-1250s.[51] After attachments had failed, this writ issued directing the sheriff to arrest the individual and to have his body before the court. Because the individual was now under arrest awaiting trial on a personal action, a bailable offense, the sheriff could allow the defendant to be released to mainpernors, who then became responsible for the released individual's appearance before the justices on the court-day, on pain of amercement.

Early English justice, with its pre-trial release procedures and compensatory "wergeld" system may seem incredibly liberal. In fact, the system was not designed out of an affinity for abstract concepts of liberty and justice. "Imprisonment was costly and troublesome . . ." and escapes easily effectuated.[52] Prior to the Assize of Clarendon (1166),[53] the circuits of the itinerant justices were irregular, and often a matter of years.[54] Grievous consequences attended a sheriff's misfeasance, malfeasance, or nonfeasance in permitting an individual to escape.[55] Family or friends often could be more successful than the sheriff in guaranteeing the appearance of an individual on the court-day. Letting an individual to pledges in return for a certain sum insured the sheriff against amercement for failing to produce the prisoner. Further, the pre-trial period was often non-existent. The "hue and cry" eliminated many malefactors before they could be concerned with the interval between accusation and trial.[56]

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[43] 3 BRACTON, NOTEBOOK, *supra* note 41, pl. 1420, at 374. *See also* Sutherland, *Mesne Process Upon Personal Action in Early Criminal Law*, 82 L.Q. Rev. 482, 482 n.5 (1966).

[44] 6 BRACTON, DE LEGIBUS, *supra* note 40, at 471.

[45] *Id.* at 471-75. This situation is illustrated by the cases of *Nicolous de Marcham v. Matheum de Guindona* and *Robertus Maudut v. Willelmum de Wirencota.* 3 BRACTON, NOTEBOOK, *supra* note 41, pl. 1308, at 311 and pl. 1324, at 317. In both cases, the initial pledges were unsuccessful in securing the appearance of the defendants, and the court was forced to rule that the defendants "should be placed under better pledges so that they will appear on a particular day."

[46] 6 BRACTON, DE LEGIBUS, *supra* note 40, at 475-77. *See, e.g.*, 3 BRACTON, NOTEBOOK, *supra* note 41, pl. 1370, at 339-40.

[47] 6 BRACTON, DE LEGIBUS, *supra* note 40, at 478-81.

[48] *Id.* at 481.

[49] 3 Edw. 1, c. 45 (1275). *See* RECORDS OF THE BOROUGH OF LEICESTER 151 (M. Bateson ed. 1899).

[50] *See, e.g., Ralph of Normanville* v. *Lucy of Kyme,* Easter 3 Edw. I (1275) reported in CASUS PLACITORUM AND REPORTS OF CASES IN THE KING'S COURTS 1272-78, at 51-55 (W. Dunham ed. 1952) (Seldon Society).

[51] *See, e.g., Placitorum Abbreviato,* at 137, 169, 174, 176.

During the reign of Henry Plantagenet, the legal patterns of accusation-trial-sentence suffered official abuse by the Crown. As part of his policy of centralization, Henry drastically curtailed the trying of prisoners. This malfeasance was continued under Henry's sons, Richard and John. The abuses strained the relationship between the royal party and the King to the point of civil war.[57] A civil war was forestalled until the Magna Carta, long acknowledged as being the great bulwark between the prerogatives of the King and the liberties of the people, was sealed in 1215.

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[52] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 584 (2d ed. 1968) [hereinafter cited as POLLOCK & MAITLAND].

[53] ENGLISH HISTORICAL DOCUMENTS 1042-1189, at 107-10 (D. Douglas and G. Greenaway eds. 1953).

[54] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 233 (1883). Even after 1166, the arrival of justices was delayed. As Irwin L. Langbein observed,

> In the reign of Henry II eyres occur much more frequently than they do in later years. Quite aside from purely fiscal or forest visitations, judges went out on circuit almost annually during the twenty years following the Assize of Clarendon . . . . But in Richard's reign and in John's first years . . . the eyres are already beginning to be spaced out at about four-year periods in any one county, and thereafter the intervals increased from an ideal seven-year period . . . to lapses of sometimes as long as fifty years under the Edwards.

Langbein, *The Jury of Presentment and the Coroner*, 33 COLUM. L. REV. 1329, 1333 n.16 (1933). This has been cited and confirmed with numerous references by DE HAAS, *supra* note 14, at 54 n.16.

[55] *E.g.*, *Pipe Rolls*, 31 Hen. at 53; 28 Hen. at 31.

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> When a felony is committed, the hue and cry (*hutesium et clamor*) should be raised . . . . The neighbours should turn out with the bows, arrows, knives, that they are bound to keep and, besides much shouting, there will be hornblowing; the "hue" will be "horned" from vill to vill.
>
> Now if a man is overtaken by the hue and cry while he has still about him the signs of his crime, he will have short shrift. Should he make any resistance, he will be cut down. But even if he submits to capture, his fate is already decided. He will be bound, and if we suppose him a thief, the stolen goods will be bound on his back. He will be brought before some court (like enough it is a court hurriedly summoned for the purpose), and without being allowed to say one word in self-defense, he will be promptly hanged, beheaded or precipitated from a cliff, and the owner of the stolen goods will perhaps act as an amateur executioner.

POLLACK & MAITLAND, *supra* note 52, at 578-79.

In the reign of Henry I such practice was censured. Section 5, 9a, of his laws ordered that "No one should be judged or condemned before he has lawful accusers personally present and the opportunity to offer a defense for the purpose of clearing himself of the charges." Downer, *supra* note 8, at 87. Section 5, 3, speaking of pre-trial liberties, instructed:

> Especially it is to be observed whether the accused has had the legal periods of respite and proper freedom to appear and make his defense so that judgment may not be passed on him while he is disseised or obliged to provide sureties or outlawed or the victim of any trick or deception.

Downer, *supra* note 8, at 85.

It was to the twenty-ninth[58] chapter of that document that future generations looked when they sought to construct a case in favor of a more liberal pre-trial release procedure.[59] The chapter stated that "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or to be outlawed, or any otherwise destroyed, but by lawful Judgment of his Peers, or by the law of the Land." The clause was not intended, as often has been maintained, to insure trial by jury. Rather, it was designed as a check against capricious methods of imprisonment and disseisin.[60] The document was not securely entrenched until the ninth year of the reign of Henry III.

## II. National Intervention

### a) *The Statute of Westminster I*

As noted,[61] for those crimes which followed the accusation-trial-sentence pattern, the interval between arrest and sentence was lengthy. Delays ran into years. Thus, a pre-trial release procedure was essential.[62] Ill-defined and broad discretionary power to bail was centered in the local representative of the Crown, the sheriff. As the Norman conquest had increased the power of the king, so too had it intensified the authority of the office of the sheriff. The sheriffs were regularly awarded custody of the king's prisoners and were given virtually complete authority to accept or reject bail.[63]

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[57] *See* McKehnie, *The Magna Carta*, in Magna Carta Commemorative Essays 2 (H. Malden ed. 1917).

[58] 9 Hen. 3, c. 29.

[59] Chapter twenty-nine was based on a clause contained in the so-called "Unknown Charter of Liberties" executed the previous year. The clause: "No man shall be seized unless by legal process" was expanded by the Great Charter to read: "unless by lawful judgment of his peers, or by the law of the land." On the "Unknown Charter of Liberty," see Round, *An Unknown Charter Of Late Liberty*, 8 Eng. Hist. Rev. 288; Hall, *An Unknown Charter of Liberties*, 9 Eng. Hist. Rev. 326. The expansion not only made execution without trial illegal, but also declared unconstitutional trials which neglected the spirit of the right.

[60] Powicke, *Per Iudicum Vel Per Legem Terrae*, in Magna Carta Commemorative Essays 104 (H. Malden ed. 1917). The barons were not claiming judgment by one's peers as an essential and universal remedy for themselves; nor is it clear that they were thinking only of themselves. The document has a "carefully drafted statement in which churchmen, citizens, and statesmen who had large experience in public office took part." *Id.* at 109. *See also* Vinogradoff, *Magna Carta: Clause 39*, in Magna Carta Commemorative Essays (H. Malden ed. 1917).

[61] *See* text accompanying notes 53-54 *supra*.

[62] *See* text accompanying note 52 *supra*.

[63] There were, however, important limitations on the discretionary power of the sheriff. First of all was the writ of *de homine replegiando*. *See generally* Maitland, *The History of the Register of Original Writs*, 3 Harv. L. Rev. 97, 167, 212 (1889); Jenks, *The Story of Habeas Corpus*, in 2

In the infancy of the criminal code, as displayed,[64] all crimes were bailable, even homicide. By the mid-twelfth century, this situation had changed. The Assize of Clarendon (1166) marked an important transition in the criminal code; the establishment of a definite class of felonies of royal concern,[65] the institution of the presentment jury,[66] and the regulation of judicial circuits[67] signaled the new Crown interest in law enforcement. The writ *de homine replegiando*, which commanded the sheriff to release the individual detained unless he were held for particular reasons, probably dates from this point.[68] Although the writ is famous for being the first "writ of liberty,"[69] it actually established the first written list of nonbailable offenses. It exempted from the category of bailable offenses "those arrested by our special command, or that of our chief justice,[70] or for the death of a man, or for an offense in our forest,[71]

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Select Essays in Anglo-American Legal History 531, 533 (1907); Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 Can. B. Rev. 92, 96-97 (1938). This writ, which was perhaps the first "writ of liberty" issued against the sheriff or private person, directing him to release upon bail any individual held "unjustly unless certain circumstances obtained or particular offences were involved." De Haas, *supra* note 14, at 64. Prior to 1275, the list of irreplevisable crimes was determined by custom. *See generally id.* at 63-72. Refusal to obey this writ opened one to the possibility of attachment. In instances where the writ *de homine replegiando* could not be granted, *i.e.*, in instances designated as irreplevisable, the writ *de ponendo* (later known as the writ *de manucaptione*) could be purchased from Chancery to effect release. *Id.* at 68-69.

Also checking the discretionary power of the sheriff was the writ *de odio et atia*. This writ lay in favor of an individual appealed of felony, *i.e.*, at the suit of a private person. It was directed to the sheriff, ordering him to make inquest whether the prisoner had been appealed out of "spite and hate." Threads of the origin of this writ can be found in the Codes of William the Conqueror. *See* Kelham, Laws of William the Conqueror 33, § 16 (1779). "Let the Appellant also himself, with seven others named, swear that what he did was not through hatred, or any other motives, than that of prosecuting his Right." If it was determined that the action were brought through hatred and malice, the appeal was denied and the individual charged (it was not necessary that the petitioner be committed to sue this remedy, 1 W. Holdsworth, A History of English Law 57 (1922)) was released. *See* Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 Can. B. Rev. 92 (1938); *Magna Carta*, ch. 36. The writ was abolished by 28 Edw. 3, c. 9 (1354), though it probably was revived fourteen years later by 42 Edw. 3, c. 1 which repealed any statute repugnant to the *Magna Carta* and *Carta de Foresta*. *See* Jenks, *The Story of Habeas Corpus*, in 2 Select Essays in Anglo-American Legal History 531-35 (1907), Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 Can. B. Rev. 92, 98-100 (1938); De Haas, *supra* note 14, at ch. IV.

[64] *See generally* discussion in section I of this article.

[65] English Historical Documents 1042-1189, at 407-10 (D. Douglas and G. Greenaway eds. 1953). *See also* the Assize of Northampton, *id.* at 411-13.

[66] English Historical Documents 1042-1189, art. I (D. Douglas and G. Greenaway eds. 1953).

[67] *Id.* at art. IV.

[68] *See Pipe Rolls*, 12 Hen. 2, c. 10.

[69] *See* note 63 *supra*.

[70] By 1275 this clause read, "or one of his Justices . . . ." *See* 3 Edw. 1, c. 15.

[71] Note, however, 5 Edw. 2, c. 19 (1311) which removed this offense from the list of nonbailable offenses:

> [N]o one shall be taken or imprisoned for Green-Hue or Hunting, unless he be found with the Mainour, or indicted. . . and then the Chief Warden of the Forest shall deliver him to Mainprise until the Eyre of the Forest, without taking anything for his deliverance. And if the said Warden will not do it, he shall have a Writ in the Chancery which was of old ordained for such Persons indicted, to be at Mainprise until the Eyre; And if the said

or for any other *retto* [wrong] for which according to English custom he is not replevisable."[72] Thus, after a century of Norman rule, a code of custom had grown which established certain nonbailable offenses. In addition, the final phrase of the writ provided an "elastic clause," which allowed the inclusion of an offense as it became a matter of Crown concern.[73] In all other cases, the sheriffs were allowed broad discretion.[74]

This broad discretionary power resulted in grave abuses of the system by the sheriffs. Local and private bailiffs complained that money was demanded of them before the sheriff would receive prisoners.[75] There were also complaints that sheriffs extorted money for bail or replevin from individuals who had a right to release without charge[76] and accepted bribes to admit to bail those who were not replevisable.[77] To remedy such abuses,[78] and similar ones perpetrated by other local officials,[79] the Statute of Westminster I (1275) was

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> Warden, after the receiving of the said Writ, do [*sic*] not cause such Persons indicted to be delivered to Mainprise, without taking anything, then the Plaintiff shall have a Writ in Chancery to the sheriff, to attach the Warden before the King, to answer at a certain day, why he hath not replevied him, who is so taken.

The act was revoked by the Statute of York in 1322, though it was revived in the first year of Edward III's reign. 1 Edw. 3, c. 8 (1327). Prior to the Act of 1311, and after the establishment of crimes of the forest as irreplevisable, justices of the forest were authorized to release on bail prisoners who were detained in custody for offenses in the royal forest. In fact, this was one of their "principal ministerial duties . . . ." *See* SELECT PLEAS OF THE FOREST xv (Seldon Society, 1901) (G. Turner ed. 1901) "[a]ny poacher caught in the act of killing a deer, or with venison in his possession, was forthwith sent to prison, from which he could only be released on an order from the justice of the forest or from the king." *See also id.* at xxxiii-iv. The writ *de homin replegiando,* like the Statute of Westminster I which affirmed it, was not a limitation on central judicial officers. *See, e.g.*, *Case of Alan Maidwell* (1255), *id.* at 28, where the sheriff was amerced for delivering to bail an individual without an order from the king or his justices. *See also id.* at lxiii-iv.

[72] DE HAAS, *supra* note 14, at 65.

[73] *Id.* at 72.

[74] Enumerating the general guidelines for the sheriff, Bracton explained:

> In every *injuria* and trespass against the king's peace to which the word 'felony' is added, the appellee or person accused is usually released by pledges, except in the case of homicide, since no one who can provide pledges is to be thrust into prison unless it is evident that he has perpetrated so serious a crime that he ought not to be handed over either to sureties or soldiers but suffer the penalty of imprisonment and confinement, the sheriff ought to determine whether he is to be taken into custody or committed to sureties, after taking into consideration the nature and gravity of the crime of which he is accused, or the distinguished rank and great wealth of his integrity or official position.

2 BRACTON, DE LEGIBUS, *supra* note 40, at 349-50. *Compare* these criteria *with* those set forth in *United States* v. *Lawrence*, 26 F. Cas. 887 (C.C.D.C. 1835) (No. 15,557).

[75] *See, e.g.*, 1 ROTULI HUNDREDORUM 10.

[76] *See, e.g.*, *id.* at 15.

[77] *See, e.g.*, 2 *id.* at 194.

[78] *See* 1 *id.* at 44, 69(2), 73, 126, 174, 212, 233, 251, 287, 372, 379, 393-94, 436-37, 448-49, 454, 466, 480(2), 481(2), 491, 494, 503, 509, 513-15, 537; 2 *id.* at 16-17, 20, 23, 51, 53, 109, 170, 181, 188, 191-92, 194, 251, 256, 279, 285-86.

[79] That is, mayors, 1 *id.* at 125, 177; subsheriffs, 1 *id.* at 281, 306, 389; 2 *id.* at 8, 16, 99, 104, 125, 256; clerks of sheriffs, 1 *id.* at 480, 515; serjeant of the sheriff, 1 *id.* at 491; bailiffs, 1 *id.* at 44, 251, 306, 314, 370, 372, 383-84, 393-94, 444, 480, 481, 499, 500, 509, 511, 515, 538; 2 *id.* at 170, 182, 189, 191(2), 195, 206-07, 227, 251, 254; subbailiffs, 1 *id.* at 306, 383, 491; 2 *id.* at 145-46, 195;

enacted.[80] The statute eliminated the discretionary power of the sheriffs and other local ministers by carefully enumerating those crimes which were not replevisable[81] and those crimes which were replevisable[82] by sufficient sureties without further payment. The statute also imposed penalties upon those entrusted with the care of prisoners for taking surety from one who was not replevisable or refusing to take surety from one who was replevisable.

Since proper investigative machinery was lacking, the statutory remedy was easily avoided. Sheriffs continued to enrich themselves by exacting large sums for showing favors and extorted undue security and property on pretense. The sheriffs seem to have been ingenious in the art of abuse.[83] The

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constables, 1 *id.* at 174, 251, 379, 448-49, 480(2), 481, 500, 503, 514, 515; 2 *id.* at 101, 159; clerks of constables, 1 *id.* at 480, 503; coroners, 1 *id.* at 505, 538; 2 *id.* at 146, 159(2), 160, 196; governors of the prison, 1 *id.* at 491; wardens of the prison, 1 *id.* at 480; serjeants of the eyre, 1 *id.* at 466, 508; clerks of the hundred, 2 *id.* at 146; clerks, 2 *id.* at 159-60; senechals, 1 *id.* at 195-96, 201, 203, 208; 2 *id.* at 146, 159; clerks of senechals, 2 *id.* at 182; catch polls, 2 *id.* at 195.

[80] 3 Edw. 1, c. 15.

[81] In addition to "those that were taken for the Death of a Man, or by Commandment of the King, or one of his Justices, or for the Forest . . ." (*i.e.*, those crimes formerly specified in the writ *de homine replegiando* ), the following crimes were stated to be irreplevisable:

> such Prisoners as before were outlawed, and they which have abjured the Realm, Provors, and such as to be taken with the Manor, and those which have broken the King's Prison, Thieves openly defamed and known, and such as be appealed by Provors, so long as the Provors be living (if they be not of good Name) and such as to be taken for House-burning feloniously done, or for false Money, or for counterfeiting the King's Seal, or Persons excommunicated, taken at the Request of the Bishop, or for manifest Offenses, or for Treason touching the King himself . . . .

*Id.*

[82] The list included:

> such as be indicted of Larceny, by Enquests taken before Sheriffs or Bailiffs by their Office, or of light Suspicion, or for Petty Larceny that amounteth not above the Value of xii d. if they were not guilty of some other Larceny aforetime, or guilty of Receipts of Felons, or of Commandment, or Force, or of Aid in Felony done; or guilty of some other Treaspass, for which one ought not to lose Life nor Member, and a Man appealed by a Provor after the Death of the Provor (if he be no common Thief, nor defamed) . . . .

*Id.*

[83] In 1285 it was complained that "Sheriffs, feigning many Times certain Persons to be indicted before them in their Turns of felony and other Trespasses, do take Men that are not culpable nor lawfully indicted, and imprison them, and do exact Money from them, whereas they were not lawfully indicted by twelve Jurors . . . ." It was therefore enacted that anyone imprisoned other than by indictment by inquest, taken by at least twelve lawful men, shall have an action by writ of imprisonment against the sheriff or bailiff of franchise. Statute of Westminster II, 13 Edw. 1, c. 13.

In 1292, the coroner of Leicestershire was ordered by the justices of the King's Bench to cause Steven Rabaz, the Sheriff of Leicester and Warwick to come before them "to answer the lord king, why against the law and custom of the King's realm etc. he had handed over to twelve mainpernors Henry, son of John of Bracebridge, of Gaddesley . . . ." Henry had been appealed in the King's Bench of the death of one Richard, son of Henry le Provost. The sheriff had released Henry to mainpernors while the appeal was pending, clearly in contravention of the Statute of Westminster I. The Leicestershire sheriff failed to appear before the Court, and upon his default, the grand distraint issued to the sheriff of Northamptonshire (since Steven had nothing to distrain in Leicestershire but did have holdings in Northamptonshire). 2 SELECT CASES IN THE KING'S BENCH UNDER EDWARD I 117 (G.O. Sayles ed. 1938). The following year, the same sheriff was condemned in Parliament for letting one Radulphum de Cokehull, indicted for murder, to absence of a centralized investigatory procedure no doubt allowed many abuses to go undetected. In 1299, however, the sanction of the Statute of Westminster I[84] was given teeth by the establishment of a check by agents of the central government.[85] In that year, justices of the assize were given power to make gaol deliveries and to conduct investigations into violations of the Statute of Westminster I.

It should be noted that the whole realm was not bound by the Statute of Westminster I's designation of bailable and nonbailable offenses. Edward I's charter to the new boroughs of North Wales, granted less than ten years after the Statute of Westminster I, guaranteed bail to any burgess "arraigned, accused, or indicted" of any crime punishable by death or mutilation as long as they shall "find good and sufficient surety to stand their trial before our chief justice or our justices appointed for this purpose."[86] The most conspicuous exception to the Statute of Westminster I was the city of London. The Custumal of 1216 provided that if anyone were killed in London or Portsoken,

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bail "contra forman statuti . . ." and also for permitting a certain William, son of Walter la Persone to bail "contra volumtatem et preceptum Domini Regis . . ." for which actions he was ordered to be committed to prison. 1 *Rot. Parl.* 95-96. Later in the decade, there is an interesting case of bribery and mainprise contrary to law in Warwick. 3 Select Cases in the King's Bench Under Edward I 84-85 (G.O. Sayles ed. 1939). *See also id.* at lxix. On June 22, 1298, a certain John Paynel was slain. His widow, Margery, afterwards moved from her manor in Straffordshire to her manor in Warwickshire. Robert de Herle, who had long desired the Warwickshire estate, took advantage of these events and procured a malicious indictment against Margery for the death of her husband. He then came to her and offered to obtain her release on mainprise, and afterwards secure her total release in return for her promise to enfeoff him with the Warwickshire manor. Perhaps out of guilt, or merely fear, she agreed. Robert de Herle then prevailed upon the sheriff to release her to mainprise, though release in such cases was prohibited by law. The remaining part of the agreement was thereupon fulfilled. The conspiracy was later brought to light when Robert de Herle was attached to answer the king on a plea of conspiracy and trespass brought by Nicolas le Archer, who sued in support of the king's legal rights. In that same year, at the Lincolnshire assize, one Robert le Blund, who brought suit on behalf of the king, charged John Everard, former bailiff of the king at Elloe, with illegally allowing Thomas of Holbeach, seized for robbery in the act, and Gerard of Fleet, arrested for receiving Thomas, to mainprise in return for twenty shillings. The jury found John guilty and he was committed to gaol. Thomas and Gerard were allowed to have a suit to recover the twenty shillings if they so desired. A Lincolnshire Assize Roll for 1298, pl. 366, at 69 (W. Thomas, ed. 1944).

[84] See text following note 82 *supra.*

[85] 27 Edw. 1, c. 3 (1299).

[86] British Borough Charters 1216-1307 (A. Ballard and J. Tait eds. 1923). Document IV, B, 5(a), lists the following charters: Carmarvon (1284); Criccieth (1284); Harlech (1284); Bere (1284); Rhuddlan (1284); and Beaumaris (1296). *But see* Overton (1292). *See also* 1306 Charter to Swansea:

> [n]or shall our aforesaid burgesses be imprisoned so long as they can find sufficient security that they will answer in our hundred (court), except one arrested soon after the deed for the death of a man wickedly and feloniously slain and who shall have been indicted in due form, a thief taken with the proceeds of a thief exceeding 12 d. a burner of houses . . . taken committing felony wickedly and duly indicted, an outlaw who abjures his country, a breaker of prison from our castle of Swansea who is kept in fetters there for felony or by judgment of the court, a coiner taken with the tools for coining, or an excommunicated person imprisoned at the instance of the bishop.

British Borough Charters 1216-1307, at 192 (A. Ballard and J. Tait eds. 1923). *See also id.* at lxxxvi.

the sheriff was to conduct an investigation and if any one were accused the sheriff should place him under 12 pledges. If the accused were unable to arrange sufficient bail he was to be held until trial.[87] This custom was allowed throughout the thirteenth century.[88] The abusive utilization of the privilege in the early years of the fourteenth century resulted in its abolishment in 1321.[89]

It is necessary to emphasize also that the Statute of Westminster I was not meant to restrict the justices of the realm.[90] The Statute, as shown earlier,[91] was the direct result of the findings of the hundred jurors commissioned during the second year of the reign of Edward I.[92] Among their other instructions, the jurors were given the following commission:

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[87] Bateson, *A London Municipal Collection of the Reign of John*, 17 Eng. Hist. Rev. 721-22. On London privileges generally, see 9 Hen. 3, c. 9 (1225).

[88] *Calendar of Early Mayor's Court Rolls* xxvii-ix (A. Thomas ed. 1934) *citing* by way of examples 2 *Rotuli Litterarum* 160; *Calendar of Closed Rolls* (1242-1247) at 97, 278, 382; 1 *Rot. Hund.* 410.

Even after the Statute of Westminster I, the city jealously guarded its privilege. In response to Articles of the Eyre of 1276, complaining of the practice of sheriffs and other bailiffs who took money from those accused of homicide that they might be released to pledges "when they should not have been released without the King's command," the city responded that "the sheriffs can release by pledges all those who are of the liberty of the city until the arrival of the justices, of whatever felony (*latrocinio*) they are accused; on condition that each pledge is able to answer to the King for 100 shillings." The London Eyre of 1276, at 88 (M. Weinbaum ed. 1976). The custom was reaffirmed by King Edward in the city ordinance of 1285, though it was emphasized that the privilege was to be available only to freemen of the city. 1 Y.B. Eyre of London, 14 Edw. 2, at xxxii (H. Cam ed. 1968).

[89] Rex v. Gisors, [1321] Y.B. Eyre of London, 14 Edw. 2, at 47-48, 67-72 (H. Cam ed. 1968). On the twenty-ninth of October, 1312, Henry of Braundeston, a wealthy Warwickshire gentleman, was alleged to have murdered Robert of Brome. Henry was indicted for the murder, but by bribery secured election as a freeman of the city, which was recorded as dating from 11 October 1312. He was then allowed to mainprise under pretense. At the eyre in 1321, his twelve mainpernors failed to produce him, and they were duly amerced. Henry eventually secured an acquittal by London jurors in the King's Bench. The conspiracy, however, was uncovered by the justice of the eyre. The mayor, John of Gisors, was found guilty of conspiracy, removed from office, and imprisoned. The city custom, which had been upheld as recently as 1314 by the justices of the King's Bench, Cam, The Eyre of London 98, was ruled contrary to the law and custom of England and therefore abolished:

> [B]ecause the said liberty or custom of putting or releasing on mainprise persons appealed or indicted of homicide until the next Eyre of the Justices is contrary to the law and custom of the realm of England, and redounds manifestly to the delay and suppression of justice for such felonies that have been perpetrated, and because as a result of this custom felons and homicides are bold to perpetrate homicides against the peace of the lord King and to the hurt of the royal Crown, and the said John of Gisors, Mayor of the City . . . has fraudulently abused the said liberty . . . [i]t is adjudged that the Mayor and Commonalty aforesaid shall henceforth lose the said liberty or custom of releasing those indicted or appealed of homicide by mainprise . . . .

Rex v. Gisors, [1321] Y.B. Eyre of London, 14 Edw. 2, at 71-72 (H. Cam ed. 1968). The custom of mainprise for homicide was not one of those liberties restored to the city in 1327 by Edward III. *Id.* at xxxiii.

[90] This surfaces as a particularly salient issue some 450 years after the enactment of the Statute in the *Case of the Five Knights*. 3 St. Tr. 1 (1627).

[91] *See* text accompanying notes 75-80 *supra*.

[92] *See* H. Cam, The Hundred and Hundred Rolls: An Outline of Local Government in Medieval England 248-57 (1930).

> Item qui habuerint felones imprisonates et eos pro pecunia abire et a prisone evadere permiserint liberos et impune; et qui pecuniam extorserint pro prisone dimittenda per plevinam; cum sint replegiari et quo tempore.
>
> (Whoever has custody over imprisoned felons and permits them to escape for a price or to go free with impunity, or who extorts large sums for having released prisoners; let them fill the same places [*i.e.*, the place of the escaped felon] for the same terms.)[83]

The abuses of the bail system uncovered by the jurors were those of the sheriff and other local ministers charged with the custody of prisoners.[84] Thus, the following year, when Edward and his Parliament stated that "foreasmuch as Sheriffs, and others, which have taken and kept in Prison Persons detected of Felony, and incontinent have let out by Replevin such as were not replevisable, and have kept in Prison such as were replevisable, because they would gain of the one party, and grieve the Other . . . ," they were referring to the sheriffs and other inferior officers,[85] and not to the King's justices,[86] and certainly not to the King himself.[87]

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[83] 1 *Rot. Hund.* xiv.

[84] *See* notes 75-79 and accompanying text *supra*.

[85] A concurring, though admittedly biased view, is presented in COKE, THE SECOND PART OF THE INSTITUTIONS OF THE LAWS OF ENGLAND 185-86 (1671).

[86] In 1554, 1 & 2 Phil. & M., cl. 13, the Statute of Westminster I was extended to the justices of the peace. *See* text accompanying notes 127-28 *infra*.

[87] It is perhaps obvious that the king remained free to release prisoners held for offenses irreplevisable by the Statute of Westminster I, with or without security. 4 Thorne (ed.) *Bracton*, at 363. Recorded on the Rolls of Parliament in 1292 is a special order of the king issued in favor of a group of individuals charged with murder. 1 *Rot. Parl.* 98. That same year, the king ordered William le Poer, and his fellow justices appointed to deliver the Worcester gaol, to bail Geoffrey de Brochamcote, imprisoned on a charge of killing Henry Snou, because the homicide was in self-defense. *Calendar of Closed Rolls* (1288-1296) at 233. *See also* 1 *Rot. Parl.* 62 where, in the *Case of Rad's Son of Ade de Claghton* (1290), the defendant, who was detained in the prison at Oxford for the death of Benedicti Attemore, was released to bail for the same reason.

There are two cases, reported in the *Calendar of Closed Rolls* for the year 1337, where the king ordered that an individual, held for an offense irreplevisable by the 1275 enactment, be released to mainpernors. The first order, dated 6 March 1337, directed the sheriff of London to release a certain person excommunicated and imprisoned at the request of the bishop of Landoff for manifest contempt of his authority. *Calendar of Closed Rolls* (1337-1339) at 115-16. The following week the king directed that a number of persons be let to mainprise, notwithstanding the fact that they were detained by his special order. *Id.* at 116. In the sixteenth century, the power was delegated to, and often employed by, the Crown's Privy Council. *See, e.g.*, *Acts of the Privy Council* (1577-1578) at 417 (bail allowed for one accused of treason). The central courts of Westminster were also accustomed to bailing those who could not be released by statute or custom. There is an early case referred to on the Rolls of Parliament where the *Curia Regis* admitted to bail certain citizens of York who were attached on an appeal of murder, pending a question of franchise. 1 *Rot. Parl.* 145. It was customary for the King's Bench to release one accused of murder on mainprise if the case was not properly certified as to the day or year, or anything else whereby the appellees could be arraigned. *See, e.g.*, 4 SAYLES, SELECT CASES IN KING'S BENCH pl. 17, at 50 (1313 example), pl. 43, at 108-10 (1323 example) (1957).

In 1332, there is an interesting case of this kind, where the King's Bench issued a writ asking the cause of imprisonment (though not demanding the presence of the prisoner, as the writ of *habeas corpus cum causa*, developed a short time after this case, would have done) of Peter of

Finally, on the subject of the Statute of Westminster I, it should be noted that in listing the offenses for which an individual was to be released by sufficient surety, without further payment, the statute did not deem bail or mainprise mandatory in those cases. However, if one were refused release by the sheriff or other inferior judicial officer, he could apply for a writ of release. The sheriff was bound to honor this writ on pain of fine and imprisonment.[88]

b) *From the Statute of Westminster I to the Seventeenth Century*

The Statute of Westminster I, even with the buttress of 1299, provided an insufficient check on the abusive activities of the sheriff.[89] To provide some

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Hangleton. 5 *id.* pl. 30, at 70-71. The writ was returned that "Peter of Hangleton is accused of the death of John le Barber . . . ." Because the Court was not yet certified concerning any indictment made upon the death of John le Barber or any other felony or cause for which Peter could be arraigned, the steward, marshal, and coroners of the king's household were instructed to search their rolls for any indictment and, if found, to send it before the Court. In the meantime, Peter was released to mainpernors. The King's Bench might also exercise its discretion to release to mainprise pending trial those who pleaded innocent to a charge of murder, *see, e.g.*, THOMAS, CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON (1381-1413) at 234-35, or those who pleaded self-defense, *see, e.g.*, HUNNISETT, CALENDAR OF NOTTINGHAMSHIRE CORONERS' INQUESTS (1485-1558) pl. 86, at 51; 1 SAYLES, SELECT CASES IN KING'S BENCH 166-67 (1936). The procedure in cases of this kind was for the sheriff to arrest and then confine the body of the appellee in his prison until the prisoner could be handed over to the marshal of the King's Bench. 2 SAYLES, SELECT CASES IN KING'S BENCH 83 (1938). Any sheriff who released an appellee so situated was liable to fine and imprisonment.

Early in the fourteenth century, the sheriff of Shropshire was imprisoned for releasing to mainprise two individuals indicted for "giving aid and assent to the death of William of Eyton . . . ." 3 *id.* pl. 73, at 127-34. His successor was placed in a particularly difficult position by the issuance of a royal writ ordering him to allow the former sheriff to mainprise. The sheriff, however, refused to deliver his predecessor, even though he had received the writ and had been offered adequate mainprise because the former sheriff had been indicted for homicide shortly before the king's writ came to him. He therefore feared that if he released the prisoner, he would be guilty of an offense against the Statute of Westminster I. The court, however, ruled his failure to release a contempt of the lord king, as well as an unlawful imprisonment, for which he was imprisoned and held liable for damages. In the opinion of the court: "it [was] not the business of that sheriff, who is the lord king's minister, to interpret his royal command otherwise than in the way and form in which it is addressed to the same sheriff . . . ." The central courts also exercised their authority in cases of counterfeiting, 7 *id.* pl. 20, at 244-46, forging the king's seal, 2 *id.* pl. 9, at 17-18; pl. 15, at 25-26, and other treasons, *see, e.g.*, 7 *id.* pl. 8, at 114-17; pl. 19, 133-34; pl. 33, 173-75.

In 1331, one William Docleye, who was charged with treason and the murder of King Edward II, was, in the course of the proceedings, released to mainprise on three different occasions: in the first instance under twenty-four mainpernors; in the second instance under eight mainpernors; and in the third instance under six mainpernors. 5 SAYLES, SELECT CASES IN KING'S BENCH pl. 25, at 58-63. In addition, there are many instances of the release of individuals held for irreplevisable offenses under the Act of 1275 by assize justices. *See, e.g.*, *Calendar of Assize Records: Sussex Indictments* (*Elizabeth I*) pl. 1009, at 198; pl. 1475, at 282; (*James I*) pl. 320, at 64; pl. 522, at 98; *Hertfordshire Indictments* (*Elizabeth I*) pl. 833, at 130; (*James I*) pl. 1104, at 233; pl. 1133, at 238-39 (Cockburn ed. 1975). *See also Somerset Assize Orders* (1629-1640) pl. 155, at 46 (Barnes ed.); *Somerset Assize Orders* (1640-1659) pl. 24, at 9; pl. 95, at 35-36 (Cockburn ed.).

[88] *See* DE HAAS, *supra* note 14, at 87.

[89] In the fourteenth, fifteenth and early sixteenth centuries, the abuses were, to a large degree,

guarantee that the sheriff would be responsive to the Statute of Westminster I's warning, the Statute of Sheriff (1315) provided that the sheriffs and their subordinates were to have sufficient land within the same shire where they shall hold office, "to answer the King and his People. . . ."[100] Nevertheless, the practice continued.[101] In 1327, the new monarch and Parliament responded to the problem by renewing and supplementing the 1299 enactment.[102]

So persistent were the complaints, however, that more dramatic measures had to be taken. One of the basic problems was still the investigative machinery for uncovering abuses. The upper court justices were encumbered by too many other duties to lend the problem the needed attention. Assize and gaol-delivery visits were infrequent, and the great evils could be perpetrated in the period between visits. Holdsworth noted that, by the nature of things, the justices in the eyre were little concerned with the administration of justice; the Crown division of the eyre existed "to fill the king's coffers and not to maintain his peace."[103] A new machinery was needed to mend the flaws in the pattern.

The new machinery was constructed from recycled parts of a tool invented in the twelfth century for the preservation of the peace. In 1195, a proclamation was issued requiring the appointment of knights to keep the peace.[104] By the fourteenth century, these keepers of the peace had become a normal feature of local government in most counties.[105] In 1327, a statute required

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perpetrated upon persons of good fame who were imprisoned on light suspicion on the appeal of approvers. This practice was forbidden in general terms by a statute of 1311. 5 Edw. 2, c. 34. Nevertheless, the Parliament assembled at Suffolk in 1314 was moved to petition the king to redress the issuance of false indictments by subordinate officials at the court leets and sheriffs' tourns "de fere avantage a leur Mestres." 1 *Rot. Parl.* 293. The complaint was referred to Chancery, though no further action was immediately forthcoming.

[100] 9 Edw. 2, Stat. 2. *See also* 1 *Rot. Parl.* 348.

[101] In 1320, for example, Roger Palmer, sheriff of London, was found to have taken forty shillings from Thomas of Fleet, who was held on a replevisable charge, before he would let him to mainprise. Rex v. Palmer, [1321] Y.B. Eyre of London, 14 Edw. 2, at 50 (H. Cam ed. 1968).

[102]
> To eschew the Damages and Destruction that often doth by Sheriffs, Gaolers, and Keepers of Peace, within Franchise and without, which have pained their Prisoners, and by such evil Means compel and procure them to become Appealers, and to appeal harmless and guiltless People, to the Intent to have Ransom of such appealed Persons, for the fear of Imprisonment or other Cause; the Justices (2) of the one Bench and of the Other, and the Justices of Assise and Gaol-delivery, shall by force of this Statute enquire of such Compulsions, Punishments and Procurements, and hear the Complaints of all them that will complain in such Cases by Bill, and shall hear and determine such Plaints, as well at the Suit of the Party, as at the King's suit.

1 Edw. 3, c. 7. *See also* 2 *Rot. Parl.* 9, 12, for the legislative history. It was further enacted that year that sheriffs and bailiffs of franchise and all others who take indictments "shall take such indictment by Roll indented, whereof the one Part shall remain with the Indicters and the other part with him that taketh the Inquest . . . ." 1 Edw. 3, Stat. 2, c. 17, § 1. This procedure was meant to insure that indictments were not issued for the purpose of embezzlement.

[103] 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 271 (1965).

[104] See H. POTTER and O. H. PHILLIPS, A SHORT OUTLINE OF ENGLISH LEGAL HISTORY 79 (1933); B. PUTNAM, PROCEEDINGS BEFORE THE JUSTICES OF THE PEACE IN THE FOURTEENTH AND FIFTEENTH CENTURIES xiii (1938); B. OSBORNE, JUSTICES OF THE PEACE 1361-1848, at 3 (1960).

[105] *See Calendar of Patent Rolls* (1307-1313) at 29-31; *id.* (1313-1317) at 107-09, 122-24.

that "good Men and lawful" be appointed in every county "[f]or the better keeping and maintaining of the Peace. . . ."[106] Two years later, in an effort to curb the abuses of power by the sheriffs, the keepers of the peace were empowered to take indictments. Those who were indicted or taken by the keepers of the peace were not to be let to mainprise by the sheriff, nor by any other inferior officer if they were imprisoned for an offense not mainpernable by law. Further, the keepers of the peace were directed to send their indictments before the justices of gaol-delivery and to inquire whether those entrusted with the custody of individuals under indictment had released to mainprise any individual who was by law irreplevisable, and to punish any sheriff or other custodian who violated the law governing release.[107] In addition, the King and Council took the drastic step of removing all sheriffs and their subordinates throughout England, and putting them on trial before a special investigatory legal commission.[108] Those sheriffs who were reappointed and those appointed anew were required to be men of sufficient means so as "to answer to the King and People, if any will complain."[109]

The reforms were apparently ineffective in dissuading the sheriffs and other custodians from abusing their power. Less than twenty-five years after the enactments of the late 1320's and early 1330's, Parliament complained that, notwithstanding the Statute of Westminster I, wardens were refusing to bail or mainprise persons of good fame. The Parliament informed the king that rich and poor alike had been so denied unless they paid fines and ransoms which were levied by the keepers of the prison without regard for "law, reason or christianity." The petitioners characterized the wardens as tormentors. The legislators prayed, therefore, that the Statute of 1275 be continued, that an investigation into the conduct of wardens be commenced, and that those found guilty of abuse should be liable for fines and imprisonment. The petition was granted sovereign consent.[110]

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[106] 1 Edw. 3, c. 16.

[107] 4 Edw. 3, c. 2, §§ 2, 7.

[108] 2 *Rot. Parl.* 60.

[109] 5 Edw. 3, c. 4 (1331); *See also* 2 Edw. 3, c. 4 (1328). The marshal of the King's Bench presented a special problem. In the Parliament of 1320 complaint was voiced against the marshal, William of Welden. William was accused of acting in direct contravention of the law by releasing to bail individuals accused of murder and other irreplevisable acts on his own authority without reference to the justices. The justices of the King's Bench had been instructed at the previous Parliament in York to keep such prisoners in their custody and to punish those custodians who neglected their duty. The order was repeated, and the aggrieved parties were allowed actions against the marshal by writ from Chancery. 1 *Rot. Parl.* 372. In October of the same year, William was examined before the King in Parliament, and was there forced to admit that Henry de la Part, a felon who had been delivered to his custody, was not in prison, nor could he immediately be located. *Id.* at 365. William was forthwith sent to the Tower, and replaced in office by Roger atte Watre, his serjeant. *See generally Calendar of Closed Rolls* (1318-1323) at 261.

The problem must have persisted, for in 1331, when Parliament was involved in checking the power of the sheriffs, they also attempted to correct the flaw in the statutory pattern whereby persons indicted of felonies, robberies and thefts had their indictments removed before the King's Bench, and while in the custody of the marshal, were released by him to bail. It was enacted, therefore, that such prisoners shall be kept in prison as required by the charges pending against them and that if the marshal should release a prisoner not entitled to release, by bail or without bail, he was to be imprisoned for six months. It was further requested that the Justices of the King's Bench conduct an investigation into the marshal's conduct. 5 Edw. 3, c. 8 (1331).

A further abuse of the release procedure was for a new sheriff to demand bail *de novo* of persons accused of felonies and admitted to bail by the former sheriff. In 1373, Parliament prayed that those suffering this abuse be given redress.[111] In the Parliament of 1425 it was complained that sheriffs were extracting great sums of money for the release on mainprise of many arrested on writs issued at the suit of a party and that money paid for writs was being embezzled.[112] It was therefore prayed that every sheriff make a return of his writs to the King's Court and that if sufficient surety were offered it be accepted under pain of double damages. Under the scheme, "Justice of ye Peas, Stuarders of Letus and Hundredis [were empowered] . . . to enquere of such misprisons and defautes of ye said Sherefs. . . ." The King accepted the recommendation, and its provisions were embodied *in toto* in statute.[113]

By 1444 the extortions and oppressions by the sheriffs had become unbearable. Threats of fine seemed to have been ineffective in dissuading them from employing their powers so abusively. Thus, the powers of the office of the sheriff were greatly curtailed. First, the tenure of office of sheriff was limited to one year.[114] Next, it was enacted[115] that sheriffs and their subordinates were not to accept anything "by Occasion or under Colour of their office" for their "Use, Profit or Avail" offered by anyone subject to arrest or from anyone seeking mainprise or bail, under pain of fine. Further, the said officials were required to set at large those held for bailable offenses offering sufficient surety.[116] Bail was specifically denied those who were in custody by "Condemnation, Execution, *Capias Utlagatum* or Excommunication, Surety of the Peace, and all such Persons which be [or shall be] committed to Ward by special Commandment of any Justice, and Vagabonds refusing to serve according to the Form of the Statute of Labourers. . . ." Justices of the assize in their sessions and justices of the peace in their counties were authorized to initiate investigations of acts repugnant to the statute without special commissions.[117]

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[110] 2 *Rot. Parl.* 266. The legislators further suggested that two categories of suspects not specifically mentioned in the replevisable clause of the Statute of Westminster I be designated as bailable, *i.e.*, those arrested by *capias* on a writ of account and those appealed by an approver in his lifetime. There was no action taken on this recommendation.

Three years after the investigation was urged, Peter de Nuttle, sheriff of York, was ordered, on pain of £100, "to desist from the extortions, grievances and injuries inflicted by him and his ministers upon the king's people, demanding and receiving nothing from them contrary to the great charter and other statutes . . . ." *Calendar of Closed Rolls* (1354-1360) at 534-35. One specific complaint against Peter was that he held his tourns as often and whenever he pleased without the customary places, and there took indictments and inquisitions in private without making any indenture, "under colour of which indictments he causes many men of the country to be taken and detained in prison at his pleasure until he has exacted heavy fines and ransoms for having their mainprise . . . ." *Id.* Peter was then ordered under pain of £1000, to deliver to the king's representative, and by the representative to be conveyed to the justices of gaol-delivery, all indictments for felonies and other trespasses made before him. *Id.* at 478.

A number of justices were then commissioned to hear and determine these trespasses and other excesses committed by Peter and his subordinates. *Id.* at 540. Several of the sheriff's ministers were indicted and removed from office, *id.* at 482-83, and the sheriff himself was replaced later in the year by Thomas Musgrave, who faced a similar charge six years later. SELECT CASES BEFORE THE KING'S COUNCIL 1243-1482, at 54-60 (I. Leadman and J. Baldwin eds. 1918).

The charges against Musgrave were malicious arrest, false imprisonment, endeavoring to entrap the complainants, and charging excessive bail. The complaint was brought by Sir Thomas Ughtred, Sir John, Nicolas Hotham, Sir Simon de Heserton (member of Parliament for the county) and William Crausewyk. The sheriff based his defense on statutory and special authority, 5 Edw. 3, c. 14 (1331); 34 Edw. 3, c. 1 (1360), but in the end pleaded guilty to the charges and also submitted a royal pardon. About the same time, Johannes Ammory de Horncastre, seneschal of the bishop of Carlisle, was charged with taking forty shillings from Thoma Broune and twenty shillings from Couper for mainprise "under pretext of his [former] office extortionally . . . ." RECORDS OF THE PEACE IN LINCOLNSHIRE 1360-1375, at 29 (Sillen ed.).

[111] 2 *Rot. Parl.* 320.

[112] 3 *id.* at 306.

[113] 4 Hen. 6, c. 1 (1425).

Another common abuse of power by sheriffs, under-sheriffs, clerks, bailiffs, and other keepers of prisons was to issue indictments and presentments whereby individuals would be attached, arrested and imprisoned. The prisoners were then constrained to make grievous payments of fines and ransoms for their release. Upon their release, the presentment or indictment would be quashed.[118] Almost thirty years after this abuse was first complained of in Parliament, it was ordained and established that sheriffs and other subordinate officials were not to arrest or to fine anyone indicted or presented before them.[119] Such indictments and presentments were to be brought before the justices of the peace at their next session. Moreover, justices of the peace were now empowered to arraign and deliver individuals so indicted and presented. Prior to this act, justices of the peace were only authorized to take bail for future good behavior,[120] that is, they previously had no power to bail pending appearance.

The Statute of 1461 was a "half-way" measure. The justices of the peace could only bail those indicted before them. Six years prior to the 1461 statute, due to what the Commons perceived as a great abuse whereby many subjects were arrested and charged with color or suspicion of felony, and constrained to pay excessive mainprise and fines, and others "for evil wille and malice" were held without bail or mainprise until the coming of the justices of gaol-delivery, the legislators recommended that justices of the peace be given power to bail such prisoners.[121] Six years after the 1461 enactment, the Parliament again complained that many were being imprisoned on a mere suspicion of felony, and were compelled to lie in prison until the coming of the justices of gaol-delivery. It was requested therefore that justices of the peace be given full power and authority to let to bail all prisoners held for suspicion of felony.[122] The King responded that he would be advised, *i.e.*, no action was taken.

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[114] 23 Hen. 6, c. 8 (1444).

[115] *See* 5 *Rot. Parl.* 110.

[116] 23 Hen. 6, c. 9 (1444).

[117] *See also* 23 Hen. 6, c. 10 (1444); 23 Hen. 6, c. 14 (1444).

[118] *See* 4 *Rot. Parl.* 406, 450.

[119] 1 Edw. 4, c. 2 (1461).

[120] That power was itself fairly recent, dating from 1360, 34 Edw. 3, c. 14 (1360). It was a natural step in the progression. In 1328, keepers of the peace had been given power to punish lawbreakers, 2 Edw. 3, c. 6 (1328); and in 1344, keepers of the peace, who were learned in law, were appointed "to hear and determine Felonies." 18 Edw. 3, c. 2 (1344).

[121] 5 *Rot. Parl.* 332.

Finally, in 1483 it was enacted that justices of the peace were to have power and authority, in their discretion, to let those who were daily arrested and imprisoned for suspicion of felony, sometimes of malice and sometimes of light suspicions, to bail or mainprise as though such person or persons were indicted before the justices in their sessions.[123] Thus, in order to remedy the great abuse of incarceration without opportunity for bail or mainprise, justices of the peace were given complete discretion to let prisoners to bail or mainprise. The statute also attempted to cure a further abuse whereby sheriffs allowed prisoners to escape upon payment of a favor.[124] Power was given the justices to inquire into escapes and to determine whether they had been allowed by favor, affection, or corruption.[125] The statute further prohibited sheriffs, under-sheriffs, escheators, bailiffs of franchise, and others from taking or seizing the goods of any individual so arrested or imprisoned, upon pain of forfeiture of double the value of the goods so seized.

The Statute of 1483 proved unsuccessful, and was repealed three years later.[126] Many of those let to bail or mainprise by the justices of the peace had absconded, contributing to the already chaotic situation produced by the War of the Roses. It was enacted, therefore, that at least two justices of the peace were required to admit a prisoner to bail or mainprise. Further, it was required that one of the justices certify the taking of bail or mainprise at the next general session of the Peace or next gaol-delivery. In the twenty-five year period between this act and the first act empowering justices of the peace to take bail for appearance, the authority of one justice of the peace was sufficient. This fact, in conjunction with an examination of the next statute in the adjustment sequence, suggests a cause, more salient than the surface cause of the War of the Roses, for the ineffectiveness of the 1483 statute, and indeed for this act as well. The statute provided a check against the complete impunity of an offender who might attempt to secure his freedom through undue influence on a justice. Apparently the justices of the peace were susceptible to the same corrupting influences which operated on the sheriffs in earlier periods. The practice grew of one justice taking bail and affixing both his own name and the name of a brother justice to the document examined at the next general session of the peace, or next gaol-delivery. To conceal their affections, the corrupt justice would sign as the cause of release the reason that the charge amounted only to a "Suspicion of Felony. . . ." To remedy this situation, and to satisfy the demands of the sixteenth century citizen outraged by the escalation of crime,[127] it was enacted in 1554 that:

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[122] 5 *id.* at 620-21.

[123] 1 Rich. 3, c. 3 (1483).

[124] *See, e.g.*, 7 *Calendar of Inquisitions Misc.* (Chancery) (1399-1422). In 1419, a commission was appointed to enquire into the delivery by sheriffs of irreplevisable offenders and to investigate the escapes of felons. *Id.* pl. 563, at 325. For the results of their findings, *See id.* pls. 565, 568, 570-73, 577, 578-79, at 326-28.

[125] This section apparently had little result. *See* 19 Hen. 7, c. 10 (1503), which provided for a system of fines for the continuing suspect escapes.

[126] 3 Hen. 8, c. 3 (1486).

> [N]o Justice or Justices of Peace shall let to Bail or Mainprise any such Person or Persons, which for any Offense or Offenses by them or any of them committed, be declared not to be replevised or bailed, or be forbidden to be replevised or bailed by the Statute of Westminster primer. . . .
>
> And furthermore, That any Person or Persons arrested for Manslaughter or Felony . . . being bailable by the Law, shall not . . . be let to Bail or Mainprise by any Justices of Peace, if it be not in open Sessions, except it be by two Justices of Peace at the least, whereof one to be of the *Quorum*, and the same Justices to be present together at the Time of the said Bailment or Mainprise . . . .[128]

Whereas 3 Henry VII, c. 3 left some doubts as to what was meant by the phrase "by the law," and 1 Richard III, c. 3 seemed to allow complete discretion, the above statute made it clear that the Statute of Westminster I was the definite standard to be followed by the justices of the peace.

## III. THE UNRESOLVED DEFECT

Although during the period from the fourteenth through the sixteenth centuries the Crown and Parliament intervened positively to reform the local administration of bail, their more progressive attitude did not interfere with their other governmental policies. Beginning in the latter part of the fourteenth century, statutes, ordinances and proclamations, that made new offenses punishable by imprisonment, forbade bail or mainprise in such cases. In the late fourteenth century and throughout the fifteenth century, such prohibitions particularly characterized enforcement of the Statute of Labourers.[129] The first statute of this class was enacted in 1360.[130] It was followed by many similar enactments.[131] The Statute of 1444[132] which required bail upon reasonable sureties, excluded from its broad requirement seven categories of prisoners, including "[v]agabonds refusing to serve according to the form of the statute of labourers. . . ."[133]

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[127] 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 223 (1965).

[128] 1 Phil. & M., c. 13 (1554). The act also required that the justices conduct preliminary hearings into the manslaughter or felony before letting the individual to bail or mainprise; and to record the material facts, and together with the notice of bailment, to deliver them to the next general gaol-delivery. A statute enacted the following year, 2 & 3 Phil. and M., c. 10, required preliminary examinations regardless of whether an individual was to be let to bail or mainprise. (The two-judge rule was abrogated by the Inditable Offenses Act of 1848.)

[129] 23 Edw. 3, Statutes of the Realm 307-09. *See also id.* at 311, 312, 327, 350, 366-67, 388.

[130] 34 Edw. 3, c. 9.

[131] 12 Rich 2, c. 9 (1388); 2 Hen. 6, c. 18 (1423); 6 Hen. 6, c. 3 (1427); 11 Hen. 7, c. 22 (1494); 6 Hen. 8, c. 5 (1514).

[132] *See* text accompanying notes 114-16 *supra*.

[133] 23 Hen. 6, c. 9.

In 1496[134] and 1503[135] Parliament, in its defense appropriations, inserted a clause which provided that if anyone attempted to retake goods distrained by the tax collector, upon the certificate of the collector the accused was to be committed to ward or arrested and committed to prison without bail or mainprise at the discretion of the justice of the peace.

Orders to imprison without bail or mainprise were also issued by the Privy Council.[136] This power was exercised throughout the sixteenth century into the early seventeenth century.[137] The Privy Council's power to imprison was the source of much discontent in the second quarter of the seventeenth century, and was eventually brought under control.[138]

The Tudor and Stuart monarchs used this power unsparingly in the form of royal proclamations. For example, on February 17, 1554, Mary ordered the deportation of all "evil-disposed persons, being born out of her highness' dominions . . . fleeing from the obedience of the princess or rulers under whom they be born . . ." and empowered local ministers to arrest any who should disregard her proclamation, and confine them "without bail or mainprise till her grace's pleasure or her council's be signified upon them for the further ordering of the said person or persons. . . ."[139]

Thus, although the right to bail was on a progressive course, it existed in a rather precarious state. As with other statutory and common law rights, it was subject to the volitions of Parliament and the king. Its effectiveness was further undercut by the monarch's power to issue royal proclamations. Although this weakness was not remedied in the seventeenth century, and indeed remains a fault in the system of bail today, the mechanism was advanced a giant step in that century. The century produced three great statutes (the Petition of Right, the Habeas Corpus Act, and the Bill of Rights) which gave form to the statutory and constitutional pattern, and which were later to help fashion the American Constitution and Bill of Rights.

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[134] 5 *Rot. Parl.* 516.

[135] 5 *id.* at 534.

[136] In 1553, for example, the Council commanded Mr. Servington and others to apprehend William Andrewe and William Smyth of Ramsey, and to commit them without bail or mainprise until "they be hereafter further enquired of and otherwise ordered by Conseill." 4 *Acts of the Privy Council* (1552-1554) at 314. Later that same year, Sir Christopher Haydon, who had been authorized to seek and arrest those using "lewd talke" in Norfolk, was further directed to commit the same to gaol without bail or mainprise until the next assize. 4 *id.* at 365.

[137] *See, e.g.*, 10 *id.* (1577-1578) at 223, 228-29; arts. X, XIV, *Resolutions in Council Touching the Government of the Middle Shires* (1617).

[138] *See* Darnel Case, 3 St. Tr. 1 and parliamentary proceedings thereafter; 16 Car. 1, c. 10 (1641).

[139] 2 Tudor Royal Proclamations, pl. 404, at 31-32 (P. Hughes and J. Larkin eds. 1969). Queen Mary issued proclamations containing similar clauses in her executive order prohibiting the preaching, reading, interpreting, teaching or writing of any matter of religious doctrine without the queen's special license, *id.* pl. 390, at 5; in her proclamation regulating the wool trade, *id.* pl. 397, at 19-20; and in her order for the courteous treatment of Philip's retinue. *Id.* pl. 405, at 33-34. Further executive orders were issued by Phillip and Mary, with similar provisions, for the enforcement of the statute against heresy, *id.* pl. 442, at 57-60, and for the capture and imprisonment of navy deserters. *Id.* pl. 438, at 84. The practice was continued in the early years of the Stuarts. 1 Stuart Royal Proclamations pl. 28, at 53-56, pl. 53, at 114-17, pl. 68, at 147-48, pl. 93, at 203-06, pl. 146, at 329-36, pl. 168, at 374-80, pl. 247, at 583-85 (J. Larkin and P. Hughes eds. 1971), as well as throughout the interregnum. 1 Acts and Ordinances of the Interregnum 1642-1660, at 23, 47, 56, 270, 320, 408, 453, 469, 581, 647, 666, 955, 988, 1059, 1066, 1134 (C. Firth and R. Rait eds. 1911); 2 *id.* at 23, 126, 349, 355, 389, 392, 411, 455, 513, 548, 621, 700-01, 868-69, 899, 937, 1227, 1258, 1261, 1264, 1289, 1296, 1310, 1314, 1319, 1339, 1451-52, 1458.

## IV. THE SEVENTEENTH CENTURY

During the seventeenth century, the state of constitutional law in England was dynamic. The follies of the Stuart government goaded Parliament into a posture supportive of individual rights. The steps toward personal liberty were small; each was meant only to correct the problem at hand. The English constitutional development method was to avoid indulgence in speculative jurisprudence, and to maximize its efforts in correcting actions which impinged immediately on individual rights.

The first great document of the century, the Petition of Rights, grew out of events occurring during the reign of Charles I. Charles had agreed to aid Louis XIII in suppressing Protestant rebels in LaRochelle and to grant English Catholics liberty to worship in return for a guarantee of marriage to Henrietta Maria of France. The agreement met fierce opposition in the Parliament of 1626. Parliament was prorogued without voting financial support for the King. Charles, however, continued to collect the dues, and also imposed a forced loan. Those who refused to pay were imprisoned.[140] Five knights imprisoned for refusing to pay the illegal assessments moved on a writ of habeas corpus, directed to the warden of the fleet, to show cause why they were imprisoned.[141] The request was granted, however the return stated only: "Whereas heretofore the body of Sir Thomas Darnel hath been committed to your custody, these are to require you still to continue him; and to let you know that he was and is committed by the special command of his majesty. . . ."[142]

Sergeant Bramston, counsel for one of the knights, requested that bail be granted, arguing that the writ of habeas corpus is the only means by which to secure liberty if the cause of imprisonment is unjust. "But that cannot be done upon this return," insisted the barrister, "for the cause of the imprisonment of this gentleman at first is so far from appearing particularly by it, that there is no cause at all expressed in it."[143] Bramston submitted that the charge, coming before trial and conviction, was simply an accusation, and thus bail should be allowed.[142]

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[140] C. HILL, A CENTURY OF REVOLUTION 54.

[141] "Five Knights' Case" or "Proceedings on the Habeas Corpus" brought by Sir Thomas Darnel et al. (1627), 3 ST. TR. 1.

[142] *Id.* at 3. Each of the five returns was similar.

[143] *Id.* at 6-7. Such action was repugnant to statute law, argued the barristers. They pointed to 25 Edw. 3, c. 4 (1350) which provided:

> no men from henceforth shall be taken by Petition or Suggestion made to the King or his Council, but by Indictment or Presentment of good and lawful People of the same Neighbourhood where such deeds be done, in due Manner, or by Process by Writ original at Common Law; nor that none be out of his Franchise, nor of his Freehold, unless he be duly brought to Answer, and forejudged by the same by the Court of Law; and if any Thing be done against the same, it shall be redressed and holden for none.

Attorney General Heath conceded that the use of the sovereign power to imprison by special command would mean that many might suffer wrongful imprisonment, but argued that was not reason enough for all who were imprisoned by command of the King without more specific charge to be delivered. Heath suggested that the King's position was best for balancing the interests of society and of the individual.[143] The court adopted this reasoning[144] and remanded the prisoners to custody. The prisoners continued in

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They also pointed to 42 Edw. 3, c. 3 (1368), which, because of accusations induced by revenge and not for the well-being of the King and realm, provided that "no man shall be put to answer without Presentment . . . ."

[142] "[I]f this return shall be good, then his imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually . . . ." 3 St. Tr. 1, 8 (1627). Coke used this argument during the debates in Parliament following the trial. *See id.* at 130 (1628).

[143] Heath framed the argument as follows:

> No doubt but the King's power is absolutely over his coins; if then he shall command his coin shall be turned to brass or leather, I confess it were inconvenient; but if the king would do it, the answer that I can make is, that he would not undo the kingdom: but can your lordships hinder it, as an inconvenience, if he would do it? The Cinque Ports are free for traffick for all his subjects; but the king in his cabinet understands there is danger of war to come upon his kingdom, thereupon he shuts the ports, that no man can go out; shall the merchant say this is injustice in the king? . . . [T]he king may pardon all traitors and felons, and if he should do it, may not the subject say, If the king do this, the bad will overcome the good? But any say, The king cannot do this.

*Id.* at 45.

[144] The court stated,

> [T]he king hath done it, and we trust him in great matters, and he is bound by law, and he bids us proceed by law, as we are sworn to do, and so is the king; and we make no doubt but the king, if you seek to him, he knowing the cause why you are imprisoned, he will have mercy; but we leave that. If in justice we ought to deliver you we would do it; but upon these grounds and these Records and the Precedents and Resolutions we cannot deliver you, but you must be remanded.

*Id.* at 59. The opinion proves to be more ambiguous than one would imagine at first. The decision was to "remand" the prisoners. Most considered this to mean that the knights would thus remain in prison indefinitely. When judges remanded they could issue either a *remittitur prisonae praedictae*, to signal a final judgment, or a *remittitur quousque secumdum legem deliberatus fuerit*, indicating that the remanding order was temporary. The latter judgment was used so that the judge would have time to be advised. When the judges appeared before Parliament to answer queries on their opinion (they asked that their testimony not be recorded in the Journal, which Parliament granted), Justice Whitelocke said of the judgment, "I did never see nor know by any record, that upon such a return as this, a man was bailed, the king not first consulted. . . ." *Id.* at 161. Justice Jones answered explicitly, "[W]e remitted them *quousque*." *Id.* at 162. Justice Dadderidge also noted that in this case " a remittitur was granted . . . that we might take better advisement." *Id.* at 163. And finally Chief Justice Hyde said, "[W]e do never bail any committed by the king, or his council, till his pleasure be first known." *Id.* at 164. On the basis of the testimony of the justices before the Parliament, Helen, in The Petition of Right 3-4 (1917), suggests that the remanding order was not meant to be a final decision. The testimony is dubious when considered in light of the written opinion of the court, however. The final phrase of the court's opinion, quoted above, refers to "records and precedents" which supplied no proofs for the claim that the king or council must be advised before granting bail in such cases, but were used rather to display the fallacy of the precedents used by the petitioners to back the claim custody until January, 1628, when the King in council ordered them released.

Three months later, because of the aggravated financial state of the Crown, the King was compelled to summon a parliament. Many of those who had suffered confinement because of their refusal to defray the unconstitutional appropriations were elected to Parliament.[147] When the business of organization was consummated, Parliament moved immediately to the consideration of grievances. Among the grievances presented were complaints against the billeting of soldiers, establishment of loans by benevolence and Privy Seal, imposition of martial law, and confinement without cause shown.[148]

After heated debates, on April 1 the Commons passed three resolutions in support of the liberty of the subject:

> I) That no Freeman ought to be detained or kept in prison, or otherwise restrained by command of the King or privy-council, or any other, unless some cause of the commitment, detainer, or restraint be expressed, for which by law he ought to be committed, detained or restrained.
>
> II) That the Writ of Habeas Corpus may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by the command of the King, the privy-council, or any other, he praying the same.
>
> III) That if a Freeman be committed or detained in prison, or otherwise re-

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that "when the king hath committed one, and expressed not the cause, the court hath delivered the party . . . ." In the words of the court,

> [Y]ou will see the contrary concluded in every case that you have put: where the cause of the commitment hath been expressed, there the party hath been delivered by the court, if the case so required; but where there hath been no cause expressed, they have been remanded; or if they have been delivered, they have been delivered by the king's discretion . . . .

3 St. Tr. 1, 53.

[147] Of the seventy-six persons held for refusing to submit to the loan, twenty-seven were elected to Parliament. J. Tanner, English Constitutional Conflicts of the Seventeenth Century 61 (1928).

[148] The proceedings of the Parliament of 1628, relating to the liberty of the subjects, follows the *Darnel* case in 3 Cobbett's State Trials 59 (T. Howell ed. 1816). Sir Thomas Wentworth, one of those imprisoned for refusing to pay the illegal levy, opened the debate with a thundering speech which established the tone in which the debates would proceed.

> [P]rojectors . . . have extended the prerogative of the king beyond the just symmetry, which maketh the sweet harmony of the whole . . . . They have introduced a Privy Council, ravishing at once the spheres of all ancient government, *imprisoning us without either bail or bond;* they have taken from us, what? What shall I say indeed, what have they left us?

*Id.* at 61-62. Sir Francis Seymour continued by acknowledging that no good subject would refuse willingly to lay down his life for the good of king and country; however "he is no good subject but a slave, that will let his goods be taken against his will, and his liberty against the laws of the kingdom." Corbett, Parliamentary Debates 231. Quoting St. Paul in the Acts of Apostles, Sir Edward Coke, the intellectual leader of the House, at this time in his late seventies but at the height of his career, observed simply that "[i]t is against reason to send a man to prison without a cause." 3 St. Tr. 1, 69 (1628). Mr. Creswell observed that the laws of England are primarily concerned with the liberty of the individual. Creswell reasoned that since the king had no absolute right over private property, then it followed that the right to restrain the person without cause shown did not exist in the Crown. "[T]o have the body imprisoned without cause declared . . ." argued the legislator, "is contrary unto, and against the law of nature, and therefore not to be inforced by the sovereign upon his subjects." *Id.* at 71-73.

> strained by the command of the King, the privy-council, or any other, no cause of such commitment, detainer, or restraint being expressed, for which by law he ought to be committed, detained, or restrained, and the same be returned upon a Habeas Corpus, granted for the said party; then he ought to be delivered or bailed.[149]

The following week the Commons met in conference with the Lords.[150] The Commons began their case by asserting that the liberty against commitment before trial without cause shown was established by statute. By juxtaposing chapter 29 of the Magna Carta and an enactment of 1354,[151] the Commons concluded that "the law of the land" and "due process" were synonymous. To prove that the dictates of due process were operative before, as well as during the trial, the Commons cited a statute enacted in 1350 which stated that "none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by *Indictment* or *Presentment* of good and lawful People of the Same Neighborhood where such Deeds be done, in due Manner, or by Process by Writ original at the Common Law. . . ."[152] Heath rebutted that those laws referred not to "first commitment or putting into safe custody" but rather to "a legal proceeding to judgment or condemnation."[153]

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[149] 3 St. Tr. 1, 82-83.

[150] Most members of the Commons felt that the concurrence of the Lords was unlikely. Immediately preceding the decisive debates, the King had bolstered his camp by the appointment of five new members to the Upper House. C. FIRTH, THE HOUSE OF LORDS DURING THE CIVIL WAR 48 (1910).

[151] 28 Edw. 3, c. 3 (1354), "Item, That no Man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited nor put to death, without being brought in to answer by due process of the law." *See also* 5 Edw. 3, c. 9 (1331); 25 Edw. 3, c. 4 (1350); 37 Edw. 3, c. 18 (1363), 17 Rich. 2, c. 6 (1393); Parliamentary petitions: 2 *Rot. Parl.* 228 (1351); *id.* at 239 (1352); *id.* at 280 (1363). Further, in 1366, in answer to an unpublished petition of Parliament (cited by Mr. Hackwell in debates in Parliament reported by Cobbett, 3 St. Tr. 1, 178), Edward III promised not to make any arrest repugnant to the Great Charter by special command. The response is laden with ambiguity, and could ultimately depend on what is meant by the "law of the land." *See* note 152 *infra*.

[152] 25 Edw. 3, c. 4 (1350). They noted also 42 Edw. 3, c. 3 (1368) which, because of accusations induced by revenge, prohibited putting a man to answer without presentment. There were *technical* problems with the argument of the Commons. First, imprisonment before conviction without cause shown in certain cases, was part of the law of the land. *See* note 97 and accompanying text *supra*. Second, bail was a jailer of one's own choosing. The bail had "the power of imprisoning the principal, or surrendering him before the stipulated day of appearance . . . ." PETERSDOROFF, A PRACTICAL TREATISE ON THE LAW OF BAIL 7 (1824).

(It will illuminate the technical meaning of bail if here the two methods of pre-trial release, *i.e.*, bail and mainprise, are distinguished. Because of the ultimate focus of this paper on the United States' constitutionally regulated system of bail, the distinction has been, heretofore, unnecessary. By the seventeenth century, the two terms were "used promiscuously oftentimes for the same thing and indeed the words import[ed] much the same thing. . . ." 2 HALE, HISTORY OF THE PLEAS OF THE CROWN 124 (1736) [hereinafter cited as HALE]. Anciently, there was a difference between the two pre-trial methods of release. Unlike bail, mainprise is a recognizance in a sum certain. Further, Hawkins, *Pleas*, § 3 at 88, explained,

> A Man's Mainpernors are barely his Sureties, and cannot justify the Detaining or imprisoning of him themselves, in order to secure his Appearance. But . . . a Man's Bail are looked upon as his Gaolers of his own choosing, and that the Person bailed is in the Eye of the Law, for many Purposes esteemed to be as much in the Prison of the Court by which he is bailed, as if he were in the actual custody of the proper Gaoler.

Heath founded his case on the Statute of Westminster I, which had been the backbone of the law relating to pre-trial release since its enactment in 1275.[154] That statute listed as non-replevisable persons accused of the "Death of a Man, or by Commandment of the King, or his Justices, or for an offense in our Forest. . . ."[155] The Commons countered that the statute was not meant to bind the King's courts of law, but was directed to sheriffs and inferior officers.[156] Coke noted, for example, that bails contrary to the Statute

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Pollack & Maitland, *supra* note 52, at 589 adds, "Bail implied a more stringent, mainprise a laxer, degree of responsibility." Blackstone noted that "bail are only sureties that the person be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever . . . ." 3 W. Blackstone, Commentaries 122 (1800). *See Thomas Fauconer v. John Russell* (1416) reported in Thomas, Calendar of Plea and Memoranda Rolls of London 1413-1437, at 43-45. [In this case, the sheriff's serjeant was ordered to attach John Russell] to answer Thomas Fauconer, former mayor, on a plea of trespass. The plaintiff charged the defendant with slander. The defendant was given a day to answer charges. Meanwhile, he was handed over to bail, who were required to and did bring him before the court on July 30. A jury was summoned for the following day, and the defendant was again released to bail and this time, the defendant defaulted. The jury, however, was permitted to proceed to a verdict and the defendant was found guilty. Upon being given the verdict, the plaintiff also charged the defendant with battery, but since the defendant had not been mainprised to answering on every charge that might be made against him, the subsequent charge was quashed.]

Mainprise developed from the same origin as bail. The word comes from the Latin mainpasters, which in Anglo-Saxon was translated "helafeator," which means "loaf-eaters," *i.e.*, those whom his hands feed. As noted in the examination of the laws of the Anglo-Saxon kings and in the Laws of the Norman conquerors, a master was obliged to keep his servants and other members of his household in "borh." Also, any one who provided food and comfort for a stranger for three or more nights was expected to provide surety for him. From this guardian-ward relationship sprang the notion of mainprise. *See also* Bond v. Isaac, 1 Burr. 339 (1757); Capron v. Archer, 1 Burr. 340 (1757)). Therefore, it was incongruent to argue that *imprisonment* without cause shown was unconstitutional and that the accused was entitled to be released to jailers of his own choosing.

[153] 3 Lords Journal 754.

[154] *See* text accompanying notes 61-98 *supra*.

[155] 3 Edw. 1, c. 15 (1275).

[156] 3 St. Tr. 1, 91-92. Heath had stated that "to say courts of justice are excluded from the statute . . . cannot be." *Id.* at 41. The total weight of the history surrounding the adoption of the act clearly lies in favor of the Commons. The Commons, however, completely neglected the historical framework of the statute and relied exclusively on the words of the document. The enactment commences with a phrase explaining its reason for existence: "And for as much as *Sheriffs and others, which have taken and kept in Prison* Persons detected of Felony, and incontinent have let out of Replevin such as were not replevisable, and have kept in Prison such as were replevisable . . . ." (Emphasis added). It was argued that, "and others" comprehended only inferiors: first, because of the arrangements of the words, *i.e.*, "others" *follows* the word "sheriff"; and second, because it was not the duty of the judge to take and keep individuals in prison, rather, that was the regular duty of sheriffs, bailiffs and gaolers. Coke adopted this interpretation:

> [Viscounts et autres] means sheriffs and gaolers that have custody of gaols; so as this Act extends not to any of the king's justices, or justices of any Superior Court of Justice: first, for that they being superiors are not comprehended in the general words, as often have been observed. Second, *Queux ount prises ou reteynus prisoners*, which Judges doe not. Third. Because in those days prisoners were commonly bailed by the King's *Writ De*

of Westminster I were granted "every day."[157]

Heath continued his case by arguing that national security demanded that the King have power to confine without cause: "the King was not bound to express a cause of imprisonment, because there may be in it matter of state, not fit to be revealed for a time, lest the confederates thereupon make means to escape the hands of justice."[158] Glanville remarked that it was one thing when a King is entrusted to confer grace, but quite another thing when he is entrusted to inflict injury: "The former power, cannot, by miscounselling, be brought to prejudice another, the latter may. . . ."[159]

It became manifest to supporters of the King that the business of raising revenue would not be attended to until the matter of firmly securing the threatened liberties was completed. The King thus attempted to quell the apprehensions of the Commons by offering to affirm the Magna Carta and

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> *homine repleg'* and then also by the *Writ De odio et atia*, both which were directed to the Sheriffe.

Coke, Second Part of the Institutions of the Laws of England 185-86 (1671) [hereinafter cited as Coke]. *See also* Hawkins, *Pleas* § 33, at 95; *id.* § 80, at 113-14; 2 Hale, *supra* note 152, at 128.

[157] 2 Lords Journal 720. Thirty-one precedents showing that such persons were bailable by the court were introduced to the Lords. 3 St. Tr. 1, 98-126. For the arguments against these examples *see* Heath, *id.* at 133-48, and Ashley, *id.* at 144-51. The Commons argued that the courts' power to bail could not be touched by the Statute of Westminster I, for if that were the case, it would not have the power to free an accused murderer pending trial, which the court had done. Further, the court of King's Bench had released prisoners incarcerated at the command of the king. (Coke, *supra* note 156, at 68, noted the case of John Bilston, 18 Edw. 3, Rot. 33). But Heath argued that in all of the cases cited by the Commons, the cause of imprisonment had been returned upon a writ, or the release was approved by Council. It is likely that the Commons underestimated the strength of their claim, or feared that even though it was completely correct by legal standards it was not acceptable politically; in point of fact, note their reaction to the King's message, delivered on 28 April by the Lord Keeper, wherein the King affirmed that all statutes used in the Commons' argument were in force, and further, he assured Parliament:

> [H]e will maintain all his Subjects in the just Freedom of their Persons, and Safety of their Estates: and that he will govern according to the laws and statutes of this realm; and that ye shall find as much Security in his majesty's royal word and promise, as in the strength of any law ye can make; so that hereafter ye shall never have cause to complain.

Heath, 3 St. Tr. 1, 171. Mr. Secretary Cook moved that the gesture of the King be accepted, but the motion was not accorded general acceptance. Sir Benjamin Rudyard suggested that the House not be diverted. "We are now upon a great Business . . . . I need not tell you, that liberty is a precious thing, for every man may set his own price upon it, and he doth not value it deserves to be valued accordingly . . . ." *Id.* at 173. Sir Thomas Wentworth continued: "[N]ever [has a] house of parliament trusted more in the goodness of their king, for their own private account than present; but we are ambitious that his majesty's goodness may remain to posterity." *Id.* at 180.

[158] Heath, 3 St. Tr. 1, 154. The argument was, by a strict legal analysis, sound. Such power was used extensively by the Tudor rulers. However, there was here a fiction in its application. The power which was used by the Tudors to uncover subversive activities was being employed by Charles as a means to punish those who refused to contribute to his unconstitutional assessments.

[159] *Id.* at 160. See, however, Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475 (1977).

other statutes used by the parliamentarians in their brief.[160] The King's offer was refused and on May 8 the Commons delivered to the Lords a Petition of Right. The document read in part:

> III. And whereas also by the statute called "The Great Charter of Liberties of England," it is declared and enacted, That no Freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by lawful judgment of his peers, or by law of the land.
>
> IV. And in the twenty-eighth year of the reign of King Edward III, it was declared and enacted by authority of parliament, That no man, of what estates or conditions he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law.
>
> V. Nevertheless, against the tenor of the said statutes[161] and other the good laws and statutes of the realm, to that end provided, divers of your subjects have of late been imprisoned, without any cause shewed; and when for their deliverance they were brought before your justices, by your Majesty's Writ of Habeas Corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainers; no cause was certified, by which they were detained by your Majesty's special command, signified by the lords of your privy-council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to law.[162]

It was therefore declared that "no freeman, in any manner as before mentioned, be imprisoned or detained. . . ."[163] The King answered the following week declaring that he "willeth that right be done according to the laws and customs of the realm; and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrong or oppressions, contrary to their just Rights and Liberties: to the preservation whereof, he holds himself in conscience as well obliged, as of his prerogative."[164] The answer did not prove complete enough for the Commons.

On the same day that the Commons learned of the King's reply to their petition, he informed them that he intended to dissolve the Parliament on June 11, and that he desired that they complete the serious business of the nation, *i.e.*, the raising of revenue. The House of Commons was in an uproar. The Commons requested that the Lords join them in a request seeking the

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[160] *See* note 157 *supra*.

[161] 37 Edw. 3, c. 18; 38 Edw. 3, c. 9; 42 Edw. 3, c. 3; 17 Rich. 2, c. 6.

[162] 3 St. Tr. 221-24.

[163] *Id.* at 224. The Lords, attempting to sweeten the petition, moved to insert a clause stating that "[w]e present this our humble Petition to your majesty, with a care not only of preserving our Liberties, but with due regard to leave intire that *Sovereign Power*, wherewith your majesty is trusted for the protection, safety and happiness of the people." *Id.* at 193. The Commons objected to the acknowledgement of an extraordinary and transcendent police authority, arguing that the liberties they sought to protect could easily be subrogated by such a power. *Id.* at 198. The Lords concurred with the reasoning of the Commons, and on May 26 the Petition was presented to the King without a dissenting vote.

[164] *Id.* at 224.

King's more clear and satisfactory answer, which the Lords consented to do. Shortly afterwards the King supplied the customary response to the parliamentary petition: "Soit droit fait comme il est desire par le Petition." [Let it be as it is requested by the Petition.] Parliament was dissolved on the twenty-eighth of June. The onerous battle had reached its end. But this proved to be only a Pyrrhic victory. The struggle to secure the subjects' liberties had just begun.[165]

As drafted, the letter of the Petition of Right could easily be observed, while the spirit of the document was denied.[166] One effective method of denying the effect of the Petition of Right was for the sheriffs and others in whose custody prisoners were committed to delay in making return of habeas corpus. Such a means of frustrating the liberties of the pre-trial period is illustrated by the cases of Francis Jenkes.[167] Jenkes was charged with "sedition" after calling for the assembly of a Parliament in a public speech. Friends of Jenkes attempted to act as bail for him, but their request was denied. Jenkes' writ of habeas corpus was not entertained because it was "outside term." Another attempt to secure Jenkes' release by bail failed because the case had not been calendared. The court also refused to command the gaoler to calendar Jenkes. A subsequent writ of mainprise addressed to the court of chancery was denied on the ground that since the council-board imprisoned Jenkes, they should be petitioned.

Remedy at law was never accorded Jenkes, though he was released on bail through informal means. This use of procedural delay mechanisms displayed an insufferable loophole in the Petition of Right. The omission in the 1628 Petition was eliminated three years later by the Habeas Corpus Act of 1677.[168] The Act stated:

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[165] The King continued to collect tunnage and poundage fees without the sanction of Parliament. On 2 March 1629, the Speaker was held down in his seat to prevent him from communicating the King's prorogation command while Elliott voiced a remonstrance against the King's unconstitutional practices. Following the dissolution of Parliament, those involved in the affair were arrested. The Six Members Case, 3 ST. TR. 235 (1629). Unlike the *Darnel's Case*, the prisoners were not presented at bar. On return of habeas corpus, the cause shown was "notable contempts by him committed against Ourself and Our Government, and for stirring up sedition against us." *Id.* at 240. The accused members of Parliament maintained that the cause shown was insufficient under the late petition, *id.* at 262, and that the action against them was an infringement of their parliamentary privileges. But the judiciary would take no notice of those things done in Parliament. *Id.* After spending thirty weeks in confinement, they were ordered by the court to be released upon finding sureties for their future good behavior. *Id.* at 289. They refused the conditional release, believing that acceptance would be tantamount to an admission of guilt.

[166] Parliament was suspended for eleven years following the *Six Members Case*. Upon its return in 1640, a committee on Courts of Justice was appointed. 2 COMMONS JOURNAL 21. One of the products of that committee's labor was a provision in the "Act for the Abolishment of the Star Chamber," 16 Car. 1, c. 10, § 6 (1641), which required the granting of a writ of habeas corpus to those committed by the king's personal warrant, or by his privy-council, of any member thereof. The gaoler was to certify the true cause, and not merely the fact or any cause of the commitment. *See* E. JENKS, *The Story of Habeas Corpus*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 546. (The limited scope of the Act mandated the need for the Habeas Corpus Act of 1679.) The next step in the fine tuning of pre-conviction liberty came twenty years later. 13 Car. 2, stat. 2, c. 2. A statute was enacted which declared that no person arrested by any sheriff, etc., "upon any such writ, bill or process, [at the suit of any common person], wherein the certainty and true cause of action was not particularly expressed" should be compelled to give security for his appearance, in any penalty or sum of money, exceeding the sum of £40."

[167] Jenkes Case, 6 ST. TR. 1190 (1676).

> II . . . That whensoever any Person or Persons shall bring any Habeas Corpus . . . [he] shall within three Days after the Service . . . [be brought] before the Lord Chancellor, or Lord Keeper of the Great Seal of England . . . or the Judges or Barons of the said Court from whence the said Writ shall issue . . . and . . . the true Causes of Detainer or Imprisonment [shall there be certified]. . . .
>
> III . . . after the Party shall be brought before them, the said Lord Chancellor or Lord Keeper, or Justice or Baron before whom the Prisoner shall be brought . . . , shall discharge the said Prisoner from his Imprisonment, taking his or their Recognizance, with one or more Surety or Sureties, in any Sum according to their Discretion, having regard to the Quality of the Prisoner and Nature of the Offense, for his or their Appearance in the Court of the King's Bench . . . unless it shall appear . . . that the Party [is] . . . committed . . . for such Matter or Offenses for which by law the Prisoner is not bailable.[169]

Unfortunately, the Act closed one loophole and opened another. The acknowledgement of discretion in clause III allowed bail to be set at prohibitively high amounts.[170] Ten years after the Habeas Corpus Act, the Parliament framed, and William and Mary, the new King and Queen, consented to, the Bill of Rights. The Bill of Rights corrected the practice of setting excessive bail in criminal cases, which acted to deny the subjects' benefit of the laws, by declaring that "excessive bail ought not to be required."[171]

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[168] 31 Car. 2, c. 2. An interesting footnote on the passage of the Act is contained in J. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 224 (1948).

> Lord Grey and Lord Norris were named to be the tellers. Lord Norris, being a man subject to vapours, was not at all times attentive to what he was doing; so a very fat lord coming in, Lord Grey counted him for ten, as a jest at first; but seeing Lord Norris had not observed it, he went on with his misreckoning of ten; so it was reported to the House, and declared that they who were for the Bill were in the majority, though it indeed went on the other side; and by this means the Bill passed.

[169] I do not mean to be understood as suggesting that the famous 1679 statute was enacted in response to *Jenkes' Case*. That case was decided almost 7 years after the movement for an act such as that of 1679 had begun. Further, the Habeas Corpus Act was enacted three years after *Jenkes*. The case is employed merely as an illustration of an effective means of thwarting the Petition of Right. *See* BRUNET, DE L' HABEAS CORPUS AD SUBJICIENDUM 7-8 (1901). *See also* Duker, *English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, to be published in N.Y.U. L. REV. (Spring 1978).

[170] The judges took the action of setting excessively high bail in response to James II's influence. This avenue was employed when James failed in his attempts to repeal the Act of 1679. *See* 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 118-19 (1965); Havinghurst, *Judiciary and Politics in the Reign of Charles II*, 66 L.Q. REV. 62, 229 (1950).

[171] 1 W. & M., c. 2.

## PART II

## BAIL IN THE UNITED STATES

### I. PURPOSE

Analysis of the purpose of bail commences with the 1813 case of *United States v. Feely.*[172] Feely and his security entered into a recognizance[173] conditioned on the appearance of Feely to answer an indictment filed against him. Feely failed to appear and his default was recorded. He appeared the following term, and was placed in custody on a motion by the United States Attorney. In answer to Feely's motion to stay proceedings on a *scire facias* (a remedy for the enforcement of a bail bond or recognizance on forfeiture) issued by the circuit court, the Government argued that the court lacked jurisdiction over the recognizance on the theory that having been forfeited, the recognizance became a debt to the United States and was no more subject to that court than a debt upon a contract.[174] Chief Justice John Marshall, sitting as circuit justice, rejected the Government's argument stating, "The object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty."[175] The stay was granted.

The question of the purpose of bail was before the Supreme Court twenty-two years later in the case of *Ex parte Milburn.*[176] Milburn was arrested on a *capias* (a writ commanding the arrest of a defendant) issued upon an indictment handed up against him for illegal gambling. He failed to appear on the return date of a recognizance of bail he had given, and the recognizance was forfeited. After his arrest on another writ of *capias* Milburn was awarded a discharge by the chief judge of the circuit court on the ground that the second *capias* was issued improperly. On the return of the discharge, the majority of the judges of the circuit court issued a bench warrant. From that custody, Milburn applied to the Supreme Court for a writ of habeas corpus. Speaking for the Court, Justice Story noted:

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[172] 25 F. Cas. 1055 (C.C.D. Va. 1813) (No. 15,082).

[173] The purpose of a recognizance and a bail bond is the same. A "recognizance" is an obligation of record entered into before some court, and need not be signed by the principal or the surety; a "bail bond" is a contract by the parties, the consideration being the release of the accused from custody. Ewing v. United States, 240 F. 241 (6th Cir. 1917). *See generally id.* on the distinction between the two.

[174] United States v. Feely, 25 F. Cas. 1055, 1056 (C.C.D. Va. 1813) (No. 15,082).

[175] *Id.* at 1057. *See also* Concord Cas. and Ser. Co. v. United States, 69 F.2d 78 (2d Cir. 1934); United States v. Lee, 170 F. 613 (S.D. Ohio 1909). In discussing the duty of the surety, the court in *United States v. Field,* 109 F.2d 554, 555 (2d Cir. 1951) said,

> [t]he giving of security is not the full measure of the bail's obligation; it is hornbook law that the accused is delivered into the custody of the bail and the bail is bound to redeliver him so far as he can. It does not discharge the bail from that duty merely to abandon the security. The bail must assist in arresting the convict so far as possible; security is not a substitute.

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The District Court of New York in 1970 added that bail is not for the purpose of providing funds to the government to seek a defendant should he abscond. United States v. Melville, 309 F. Supp. 824, 826-27 (S.D.N.Y. 1970). *See also* Cohen v. United States, 82 S. Ct. 526 (Douglas, Circuit Justice, 1962); Bandy v. United States, 81 S. Ct. 197 (Douglas, Circuit Justice, 1961); Reynolds v. United States, 80 S. Ct. 30 (Douglas, Circuit Justice, 1959); Smith v. United States, 357 F.2d 486 (5th Cir. 1966); United States *ex rel.* Young v. Shaughnessy, 194 F.2d 474 (2d Cir. 1952); United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203 (S.D.N.Y. 1969).

[176] 34 U.S. (9 Pet.) 704 (1835).

> A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offense, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for the offense. And *a fortiori*, it cannot be deemed to apply to a case like the present, of a penitentiary offense; for that would be to suppose, that the law allows a party to purge away the offense, and the corporal punishment, by pecuniary compensation.[177]

The taking of recognizance or bail does not benefit the defendant alone. The Supreme Court has acknowledged that "in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial, if the government can be assured of his presence at that time."[178] The rule is based on the supposition "that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment . . . ."[179] This traditional theory, corollary to the notion of presumption of innocence, theoretically permits the accused to aid his counsel in the preparation of a defense.[180]

The function of bail is thus limited to insuring the presence of a defendant before the court. Bail cannot be employed as a "device for keeping persons in jail. . . ."[181] Further, before conviction, it is the rule that the function of bail is not "to prevent the commission of crimes. . . ."[182] The function of bail pending appeal is similar to that operating before conviction. It insures the presence of the accused when summoned to make amends to society by service of the sentence imposed. It also insures the innocent against the injustice of any imprisonment in the event of an acquittal of the charge.[183]

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[177] *Id.* at 710.

Story's outline was endorsed a half century later when Mr. Justice Bradley, writing for the Court, observed, "[t]he object of bail in civil cases is, either directly or indirectly, to secure the payment of a debt or other civil duty; whilst the object of bail in criminal cases is to secure the appearance of the principal before the Court for the purpose of public justice." United States v. Ryder, 110 U.S. 729, 736 (1884).

[178] United States v. Barber, 140 U.S. 164, 167 (1891). The Court went on to note that defendants "usually belong to the poorest class of people." Detainment, in the Court's opinion, would deprive the family of the accused of their support and assistance. *Id.*

[179] Hudson v. Parker, 156 U.S. 277, 285 (1895). In United States v. Delaney, 8 F. Supp. 224, 225 (D.N.J. 1934), Judge Clark, juxtaposing the conflicting principles necessitating the institution of bail, observed,

> It is an accepted principle of penology that the effectiveness of punishment is in direct ratio to the interval between it and its precedent anti-social act. . . . It is an equally accepted principle of organized society that only the guilty should suffer. There must be an interval, therefore, for the ascertainment of the truth of the accusation or rather for the operation of the machinery fashioned for that purpose. During that interval the two principles work against each other. Any imprisonment may punish an innocent man. Any freedom does prevent the coincidence of the act and its penalty. Bail . . . was devised to meet these conflicting interests . . . .

*See also* Heikkinen v. United States, 208 F.2d 738, 742 (7th Cir. 1953); United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002, 1004 (2d Cir. 1946).

[180] *See* United States v. Foster, 79 F. Supp. 422 (S.D.N.Y. 1948). *See also* Adams v. Illinois, 405 U.S. 278 (1972); Stack v. Boyle, 342 U.S. 1 (1951).

The court's discretion in cases of bail pending appeal where a potential risk to society may be involved is less broad. Bail pending appeal generally is not granted if an offense is an atrocious one and is likely to be repeated.[184] "If, for example, the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail."[185] For example, in 1958, Judge Clark, a circuit judge, denied an application for bail pending appeal submitted by a defendant with an extensive criminal record.[186] Eight years previously, however, Justice Jackson, sitting as circuit justice in one of the many cases involving the application for bail of a member or an alleged member of the Communist party, faced the contention that bail should be denied three Communist party members who were charged with conspiring to advocate the violent overthrow of the United States government in violation of the Smith Act.[187] Jackson found that even if he assumed that the defendants were disposed to commit every opportune disloyal act,

> it is still difficult to reconcile with traditional American law the jailing of persons because of anticipated but as yet uncommitted crimes. Imprisonment to

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[181] Workman v. Cardwell, 338 F. Supp. 893, 898 (N.D. Ohio), *aff'd in part, vacated in part,* 471 F. 2d 909 (6th Cir.), *cert. denied,* 412 U.S. 932 (1972). *See* Reynolds v. United States, 80 S. Ct. 30 (Douglas, Circuit Justice, 1959). *See also* De Angelis v. South Carolina, 330 F. Supp. 889 (D.S.C. 1971).

[182] United States v. Foster, 79 F. Supp. 422 (S.D.N.Y. 1948), in which the court went on to hold that "admission to bail is never a judicial license to continue the commission of crime." *Id.* at 423.

[183] Garvey v. United States, 292 F. 591, 593 (2d Cir. 1923).

[184] United States *ex rel.* Estabrook v, Otis, 18 F.2d 689, 690 (8th Cir. 1927).

[185] Carbo v. United States, 82 S. Ct. 662, 666 (Douglas, Circuit Justice, 1962). *See also* Rehman v. California, 85 S. Ct. 8 (Douglas, Circuit Justice, 1964).

[186] United States v. Wilson, 257 F.2d 796, 797 (2d Cir. 1958). Judge Clark wrote:

> I do not want to get into the position of saying that a charge as a multiple offender automatically renders the accused ineligible for bail; but the character and extent of a series of offenses as these (three convictions for petty larceny, one conviction for grand larceny, three infringements of state narcotics laws, three parole violations, and a federal conviction for selling heroin) does, I think, afford a proper basis for the exercise of that discretionary power to deny bail which is still reserved to the courts.

*See also* United States *ex rel.* Young v. Shaughnessy, 194 F.2d 474, 475 (2d Cir. 1952) (Clark, J., dissenting).

In 1962, bail was granted to an applicant charged with four counts of forgery and four counts of uttering false checks, and it was held that a denial of bail on appeal where the appeal is not frivolous or taken for delay would be justified only in "cases in which, from the substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release." Leigh v. United States, 82 S. Ct. 994, 996 (Warren, Circuit Justice, 1962).

[187] Ch. 439, tit. I, §§ 2, 3, 5, 54 Stat. 670-71 (1940) (current version at 18 U.S.C. § 2385 (1970)).

> protect society from predicted, but unconsummated, offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it . . . ."[188]

Jackson perceived risks involved in the granting or refusing of bail. He ruled, however, that bail should be continued until the convictions against the petitioners were adjudicated on appeal, or until the Supreme Court denied certiorari.

The synthesis of these various points is that the court will deny bail pending appeal if the petitioner has been convicted of an atrocious offense, "though such cases are rare."[189] Doubts as to whether bail should be awarded or denied are, accordingly, resolved in favor of the defendant.[190]

## II. SURETYSHIP

In the early periods of England, individuals or groups acted as sureties for the payment of "wergeld."[191] By the seventeenth century, the notion had developed that bail was a procedure whereby an individual was released from jail and delivered into the custody of a jailer of his own choosing.[192] Coke notes that the word "bail" was derived from the French word "bailer," meaning "to deliver," "because he that is Bailed, is as it were Delivered into the hands and custody of those that are his Pledge and Sureties."[193] Bail was merely a continuance of the former imprisonment.[194] This "private-jailer" concept has been retained in England. There it is "essential that the person giving bail should be interested in looking after and, if necessary, exercising the legal powers he has to prevent the accused from disappearing."[195] Inherent in this requisite element is the principle that contracts to indemnify between surety and principal are illegal.[196]

In *Herman v. Jeuchner*,[197] the Court declared null and void a contract to indemnify. Herman had been convicted of keeping a disorderly house, and was ordered to procure two sureties. He subsequently contacted Jeuchner and requested him to become surety. Jeuchner refused unless Herman agreed to deposit with him the amount for which he was to be surety. Before the expiration of the negotiated period, Herman brought an action to recover the deposit. The Queen's Bench awarded judgment to the plaintiff and declared the indemnity illegal, noting,

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[188] Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950).

[189] Rossi v. United States, 11 F.2d 264 (8th Cir. 1926). The court agreed that the presumption of innocence fades upon conviction of the accused, but observed that "one who suffers imprisonment after conviction and during pendency of his writ of error suffers the same injustice if his case is reversed and he is acquitted as one who is denied bail before his trial and subsequently acquitted endures, and it was to prevent just such punishment that the acts of Congress and the rules of the Court allowing bail were adopted." *Id.* at 265-66.

[190] Herzog v. United States, 344 U.S. 424 (1955).

[191] *See* text accompanying notes 6-27 *supra*.

[192] C. PETERSON, TREATISE ON BAIL 7. *See* 32 Geo. 2, c. 38 (1758).

[193] E. COKE, A LITTLE TREATISE ON BAILE AND MAINPRISE 1 (1635).

[194] The sureties were said to have their principal "always upon a string, and may pull the string whenever they please. . . ." 87 Eng. Rep. 982 (1704).

[195] Consolidated Exploration and Fin. Co. v. Musgrave, 1 Ch. 37 (1899).

[196] Wilson v. Strugnell, 7 Q.B.D. 548 (1881).

[197] 15 Q.B.D. 561 (1885).

> it takes away the protection which the law affords for securing the good behavior of the defendant. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the Court . . . . [B]ut if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed.[148]

This doctrine was readily absorbed into American jurisprudence.[149] In 1869, the Supreme Court echoed the British doctrine, holding that by a recognizance, "the principal is . . . committed to the custody of the sureties as to jailers of his own choosing . . . ."[150] The Court ruled that the surety could, at any time, arrest the principal and surrender him to the court. Three years later, the common law doctrine's foothold in the United States was strengthened.[151]

In 1866, Edward McGuire was released on bail pending trial in Connecticut. To avoid trial, McGuire absconded to New York, and bail was forfeited. While in New York, he was seized by the police upon the request of the Governor of Maine and delivered to Maine officials. The requisition charged burglary, committed before the recognizance in question. Neither of the Connecticut sureties knew that, when they entered into the recognizance in the Connecticut case, there was any other criminal charge outstanding against McGuire. In June 1867, McGuire was convicted by a Maine court of burglary and sentenced to fifteen years in prison. The United States Supreme Court case was brought by the Connecticut sureties seeking to avoid forfeiture of the bond. The Court held that it was the duty of the sureties to pursue their principal into New York and return him to Connecticut to answer the bond. Failing this, the sureties could not resist forfeiture. Justice Swayne added that in the exercise of their dominion over the principal, the sureties, in person or by agent,[202] could "pursue him into another State . . . arrest him on the Sabbath; and, if necessary . . . break and enter his home" in order to seize him for the purpose of delivery.[203]

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[148] *Id.* at 563.

The opinion was supplemented twenty-five years later when the King's Bench observed,

> It is in the interest of the public that criminals be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore, does not involve any illegality. If that were so, as soon as bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his trial. . . .

Rex v. Porter, 1 K.B. 369, 373 (1910).

[149] *See* L. SIMPSON, LAW OF SURETYSHIP 491 (1950).

[150] Reese v. United States, 76 U.S. (9 Wall.) 13, 21 (1869).

[151] Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872).

In 1884, the issue of indemnification was tangentially before the Court in *United States v. Ryder.*[204] Ryder, a creditor of Williams, seized property belonging to Williams and sold it after Williams failed to appear before a court in another matter and forfeited a recognizance in that matter. The Court held that the law raises no liability on the part of a person bailed to indemnify his surety for what he has been compelled to pay by reason of the former's default.[205] In dictum, the majority noted that they were inclined to think that a contract to indemnify would contravene public policy inasmuch as it would in effect be giving the public the security of one person only, instead of two.[206]

During the next three decades, the lower federal courts repeated the *Ryder* dictum and held that contracts to indemnify were illegal. In *United States v. Simmons,*[207] a federal court refused to accept bail on the ground that it appeared that the principal had executed an instrument of indemnification. The court observed that the object of accepting individuals as bail is not to enable the prisoner to escape punishment by paying money to his bail, but to secure his appearance at the proper time, in order that he may receive punishment.[208]

In 1912, the common law rule was repudiated. Writing for the Court in *Leary v. United States,*[209] Oliver Wendell Holmes stated:

> It is said that the bail contemplated by [the statute in question] . . . is a common-law bail and that nothing should be done to diminish the interest of the bail in producing the body of his principal. . . . The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000, that sum was the measure of the interest on anybody's part, and it did not matter to the Government what person ultimately felt the loss so long as it had the obligation it was content to take.[210]

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[202] *See also* Cosgrove v. Winney, 174 U.S. 64 (1899); *Ex parte* Milburn, 34 U.S. (9 Pet.) 704 (1835); United States v. Keiver, 56 F. 422 (W.D. Wis. 1893).

[203] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872).

[204] 110 U.S. 729 (1884).

[205] *Id.* at 739-40.

[206] *Id.* at 735.

[207] 47 F. 575 (S.D.N.Y. 1891).

[208] *Id.* at 577. *See also* United States v. Lee, 170 F. 613 (S.D. Ohio 1909); United States v. Greene, 163 F. 442 (W.D. Va. 1908).

[209] 224 U.S. 567 (1912).

[210] *Id.* at 575-76.

Although contracts to indemnify are considered acceptable in the United States, it is still the rule that there is no "implied obligation" on the principal to repay the surety in case of default. Ewing v. United States, 240 F. 241 (6th Cir. 1917). Without an express contract of indemnity, a surety cannot sue the criminal defendant to recover any sums lost due to forfeiture. United States v. Ryder, 110 U.S. 729 (1884).

In the United States, then, a contract system of bail has replaced the common law system. The government, the surety, and the principal are joined by the contract.[211] As with other contracts, the bail bond must be construed according to its express terms.[212] Unlike an ordinary commercial contract, the recognizance bond allows the surety to be released from liability by surrendering the principal.[213] The surety is also discharged by the principal's death,[214] although the obligation of the surety is a continuing one, and binds his estate after his death.[215]

The giving of security is not the full measure of the surety's obligation.[216] Even though the security has been indemnified, a moral obligation is said to attach.[217] The surety is not discharged from his duty to redeliver the defendant merely by abandoning the security. A surety owes the court the duty of making a reasonable effort to insure that his principal complies with its orders.[218] To guarantee itself of this effort, the court has discretionary power to refuse to accept a recognizance signed by a surety who has been fully indemnified; and it has been held that the bond should not be approved where the indemnitors are not acting in good faith.[219]

To facilitate the diligent exercise of his duties, the surety is given diffuse powers. He may arrest the principal at any time[220] within the territory of the United States,[221] provided it does not interfere with the interest of other persons who have arrested the principal.[222] In an 1898 case,[223] a bail bondsman had pursued his principal from Pennsylvania to Missouri, where he apprehended him by authority of a Pennsylvania bailpiece, and returned him to Pennsylvania. The principal contested the procedure as incongruent with his due process rights. The court rejected the contention, distinguishing the power of the bail bondsman and the authority of the state.[224] It noted that the bail bondsman proceeds by virtue of his contractual relationship, not by authority of the state.[225] Since the right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond, the surety need not resort to the legal process to detain his principal for the purpose of surrender.[226]

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[211] Heine v. United States, 135 F.2d 914 (6th Cir. 1943); United States v. Reed, 117 F.2d 808 (5th Cir. 1941); United States v. Libichian, 113 F.2d 368 (7th Cir. 1940); La Grotta v. United States, 77 F.2d 673 (8th Cir. 1935); Joelson v. United States, 287 F. 106 (3d Cir. 1923); Ewing v. United States, 240 F. 241 (6th Cir. 1917); United States v. Luther, 13 F. Supp. 126 (E.D.N.Y. 1936); United States v. Smith, 3 F. Supp. 498 (D.N.J. 1933).

[212] Joelson v. United States, 282 F. 106 (3d Cir. 1923); Barnes v. United States, 223 F.2d 891 (5th Cir. 1955).

[213] Reese v. United States, 76 U.S. (9 Wall.) 13 (1865); Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931). *See also* 18 U.S.C. § 3142 (1970) which states in relevant part,

> Any party charged with a criminal offense who is released on the execution of an appearance bail bond with one or more sureties, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy, and brought before any judge or other officer having power to commit for such offense; and at the request of such surety, the judge . . . shall recommit the party so arrested . . . and indorse . . . the discharge . . . .

Further, *see* Allen v. United States, 36 Ct. Cl. 44 (1901). In United States v. Mack, 295 U.S. 480, 486 (1935), Justice Cardozo pointed out that "at common law bail might be exonerated as of right by the surrender of their principal if their liability had not been 'fixed.' There was much learned disquisition as to the time when that event occurred." The surety may not surrender the defendant during trial and be exonerated. United States v. Rice, 192 F. 720 (S.D.N.Y. 1911). *See also* Fed. R. Crim. P. 46(f).

[214] In United States v. Kehrt, 128 F. Supp. 38, 39 (D. Alas. 1955), the court stated that "the general rule seems to be that bail will not be forfeited where performance is rendered impossible by (1) an act of God; (2) the act of the obligee; and (3) an act of law. To this may be added (4) the act of the public enemy." *See also* Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872); United States v. Costello, 47 F.2d 684 (6th Cir. 1931); United States v. Burl, 67 F. Supp. 583 (E.D. Ill. 1946); United States v. Vendetti, 33 F. Supp. 34 (D. Mass. 1940); United States v. Russo, 7 F. Supp. 391 (E.D.N.Y. 1934).

[215] United States v. Keiver, 56 F. 422 (W.D. Wis. 1893).

[216] United States v. Field, 190 F.2d 554 (2d Cir. 1951).

[217] Concord Cas. and Sur. Co. v. United States, 69 F.2d 78 (2d Cir. 1934).

[218] United States v. Nordenholz, 95 F.2d 756 (4th Cir. 1938).

[219] United States v. Lee, 170 F. 613 (S.D. Ohio 1909). *Compare id. with* Regina v. Badger, 4 Q.B. 468 (1843).

If the surety fails to deliver the defendant when required to do so, or if any other condition of the bail bond is violated, the bail becomes absolutely obligated to the United States for the full amount of the bond.[227] In 1810, Justice Washington ruled that it was essential that the party who was to appear be summoned by the court before a default would be entered.[228] In a case later in the century, a federal court repudiated Washington's ruling, and held that the failure of sureties to produce their principal for trial when called upon to do so at the time regularly set for trial was sufficient notice to them.[229] By 1931, it was established that notification was not a prerequisite for the forfeiture of a bail bond.[230]

The forfeiture functions as a deterrent to violations of bail covenants which create unnecessary delay and expense to the government.[231] For this reason, the forfeiture ought to bear some reasonable relation to the cost and inconvenience incurred by the government in regaining custody of the defendant and again preparing for trial.[232] In order to rectify any injustice, the courts are empowered with authority to remit the forfeiture, in whole or in part,[233] inside[234] or outside[235] term,[236] so as to establish a state of substantial justice.[237] In *United States v. Feely,*[238] Chief Justice Marshall held that when a defendant enters into a recognizance to appear, but fails to do so until the succeeding term of the court, the court in which the recognizance is filed may suspend or discharge the penalty if good cause for non-compliance is shown. In 1839, the Chief Justice's rule was put in statutory form.[239] The statute provided that

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[220] United States v. Field, 193 F.2d 86 (2d Cir. 1951), *cert. denied*, 342 U.S. 908 (1952).

[221] Reese v. United States, 76 U.S. (9 Wall.) 13 (1869); United States v. Schneiderman, 102 F. Supp. 52 (S.D. Cal. 1951).

[222] Johnson v. Thompkins, 13 F. Cas. 841 (C.C.E.D. Pa. 1833) (No. 7,416).

[223] *In re* Von der Ahe, 85 F. 959 (W.D. Pa. 1898).

[224] *Id.* at 960.

[225] *See* Goldberg, *Extra-Jurisdictional Power of Bail*, 66 DICK. L. REV. 101 (1961); Note, *Bailbondsmen and the Fugitive Accused — The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964).

[226] Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931); *In re* Von der Ahe, 85 F. 959, 960 (W.D. Pa. 1898).

[227] United States v. Mack, 295 U.S. 480 (1935); United States v. Foster, 417 F.2d 1254 (7th Cir. 1969).

[228] Dillingham v. United States, 7 F. Cas. 708 (C.C.D. Pa. 1810) (No. 3,913). *See also* United States v. Rundlett, 27 F. Cas. 915 (C.C.D. N.H. 1854) (No. 16,208).

[229] United States v. Dunbar, 83 F. 151 (9th Cir. 1897).

[230] "It is [the defendant's] . . . duty to follow the proceedings and to be in court when his presence is required. . . . Likewise, it is not necessary that notice be given the surety to produce the body of the defendant in court." Western Sur. Co. v. United States, 51 F.2d 470, 472 (9th Cir. 1931).

[231] Smith v.United States, 357 F.2d 486 (5th Cir. 1966).

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[232] United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970).

[233] Sifuentes-Romero v. United States, 374 F.2d 620 (5th Cir. 1967).

[234] United States v. Barger, 20 F. 500 (W.D. Pa. 1884).

[235] United States v. Traynor, 173 F. 114 (E.D. Tenn. 1909).

[236] In earlier periods, contrary opinions were expressed. *See* 6 Op. Att'y Gen. 408 (1854); United States v. Cookendorfer, 25 F. Cas. 618 (C.C.D.C. 1837) (No. 14,856) (only the President had power to remit).

[237] The judicial department does not possess exclusive authority to remit forfeitures of bail bonds. By virtue of the executive power to pardon, U.S. CONST. art. II, § 2; *see generally* Duker, *The President's Power to Pardon*, 18 WM. & MARY L. REV. 475 (1977), the President of the United States has power to remit fines and forfeitures. The Laura, 114 U.S. 411 (1884); Osborne v. United States, 91 U.S. 474 (1875). Although an early opinion of the Attorney General denied the existence of the power to remit forfeitures of bail in the executive branch, 4 Op. Att'y Gen. 144 (1843), a 1906 decision held otherwise. United States v. Alexandroff, 148 F. 652 (E.D. Pa. 1906).

The case involved a Russian sailor, Leo Alexandroff, who while in harbor in the United States, deserted his contractual duty to serve on a Russian ship. He was arrested at the insistence of the Russian vice-consul and committed to a county prison. He was later discharged on a writ of habeas corpus, with a bail of $200. On appeal, the Supreme Court held that Alexandroff should be delivered to Russian authorities. Alexandroff, however, failed to appear and bail was forfeited. The respondents in the case demanded that court costs be reimbursed from the proceeds of the forfeiture. The federal court denied the request, and stated in dictum that the moneys belonged to the United States, "though the President could remit the forfeiture." *Id.* at 653.

Even prior to the 1843 opinion of the Attorney General, Chief Judge Cranch, in United States v. Cookendorfer, 25 F. Cas. 618 (C.C.D.C. 1837) (No. 14,856), held that after the term in which a recognizance has been forfeited in a criminal case, the court could not remit the forfeiture, although the President could. While the court relied on a statute authorizing the President to grant remissions of the forfeitures of all recognizances taken before any court within the District of Columbia, the provision of article II, § 2 of the Federal Constitution would appear to have been sufficient.

Nevertheless, the power in the executive branch does not comprehend the power of the United States Attorney to compromise a claim of the United States on a forfeited bond, for example, by promising to see that the civil action is foreclosed if the surety pays the fine. United States v. Manger, 7 F. Supp. 720 (S.D.N.Y. 1934). Further, the Office of the Attorney General has expressed the opinion that the Secretary of the Treasury has no authority to accept a compromise of a final judgment on a forfeited bail recognizance. 36 Op. Att'y Gen. 40 (1929-32). Finally, in addition to the presidential power to remit, the Congress, as the government observed in the case of United States v. Davis, 202 F.2d 621 (7th Cir.), *cert. denied,* 345 U.S. 998 (1953), has frequently passed private acts remitting forfeitures.

[238] *See* note 172 and accompanying text *supra.*

[239] Ch. 36, 5 Stat. 322 (1839).

The previous year, a circuit court had taken a position more liberal than either the court in *Feely* or the Congress in the enactment of 1839 by setting aside the forfeiture of security on a defendant who had departed the jurisdiction of the court without leave, and who was later acquitted of the alleged misdemeanor. Justice Nelson, in United States v. Santos, 27 F. Cas. 954 (C.C.D. Me. 1862) (No. 16,223), acknowledged that he had gone beyond the 1839 enactment, whenever it appears to the court that public justice does not otherwise require the same penalty to be exacted, the court shall have authority in its discretion to remit the whole or portion of the penalty. A federal court, twenty-six years later, interpreted the act to mean that when there was no collusion with the principal, no aid extended to him to escape, or no effort to defeat the ends of public justice, the court shall have discretionary power to relieve the surety from the penalty of the recognizance.[240]

Even though the word "parties" in the 1839 statute had been eliminated and replaced with the word "party,"[241] thus allowing a more progressive interpretation, the consensus of lower federal courts spurned the liberal connotation and construed "willful default of the party" as meaning the willful default of the principal.[242] The interpretation can only be explained as an effort on the part of the courts to secure the maximum effort of the surety. In 1942, the Supreme Court concurred with the judgments of the lower federal courts on the definition of the word "party."[243]

It should be noted that "the words 'willful default' mean more than a default arising from ignorance, inexperience, inattention, thoughtlessness, or even carelessness and negligence. . . ." They "indicate a default knowingly, intentionally, and deliberately made."[244] In addition to the absence of willful default, before remission is granted, the court must be satisfied that a trial can still be had in the case, and that "public justice" will be accommodated.[245]

The Supreme Court in 1935 characterized remission as "an act of grace."[246] The discretionary power of the court was extended by the passage of Rule 46

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but insisted that enforcement of the forfeiture would be "unreasonable."

[240] United States v. Duncan, 25 F. Cas. 937 (W.D. Pa. 1863) (No. 15,004).

[241] Rev. Stat., tit. XIII, § 1020 (1873-1874).

[242] United States v. Robinson, 158 F. 410 (4th Cir. 1908). The court here refused to remit a forfeiture due to the principal's failure to appear, even though a short time after the appearance date, one of the sureties on the bail bond apprehended and redelivered the principal. *But see* Griffin v. United States, 270 F. 263, 265 (N.D. Ga. 1920), in which District Judge Sibley rejected the view and held: "All doubt was removed by the Revised Statutes, changing the word 'parties' to 'party,' plainly meaning the party who was applying for the remission." *See also* United States v. Kelleher, 57 F.2d 684 (2d Cir. 1932); United States v. Costello, 47 F.2d 684 (5th Cir. 1931); United States v. American Bonding Co., 39 F.2d 428 (9th Cir. 1930); Weber v. United States, 32 F.2d 110 (8th Cir. 1929); Skolnik v. United States, 4 F.2d 797 (7th Cir. 1924); Henry v. United States, 288 F. 843 (7th Cir. 1923); United States v. LaVine, 28 F. Supp. 113 (D.C. Md. 1939); United States v. Barnett, 22 F. Supp. 394 (E.D. Ky. 1938); United States v. Slaimen, 6 F.2d 464 (D.R.I. 1925); United States v. O'Leary, 275 F. 202 (S.D.N.Y. 1921); United States v. Fabata, 253 F. 586 (N.D.N.Y. 1918).

[243] Continental Cas. Co. v. United States, 314 U.S. 527 (1942). The opinion, delivered by Justice Reed, was in answer to certified questions from a court of appeals concerning the power of district courts to relieve innocent sureties from the penalty of a forfeited recognizance. The court held that "there can be but one person who can willfully default within the meaning of the section. This is the principal in the recognizance." *Id.* at 530.

[244] United States v. Smoller, 275 F. 1011, 1012 (D. Del. 1921).

[245] United States v. Reed, 117 F.2d 808 (5th Cir. 1941); United States v. Nordenholz, 95 F.2d 756 (4th Cir. 1938); United States v. Fackler, 15 F. Supp. 460 (M.D. Pa. 1936); United States v. Sulvani, 4 F. Supp. 775 (W.D.N.Y. 1933).

[246] United States v. Mack, 295 U.S. 480, 489 (1935).

of the Federal Rules of Criminal Procedure, subdivision (f)(2),[247] which provided that the court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require enforcement of the forfeiture.[248] The rule greatly liberalized the policy of remission, as far as the surety was concerned.[249] The imposition of forfeiture was now a matter vested in the sound discretion of the court.[250] The only requirement is that "justice" be accommodated. The exercise of discretion must, therefore, be "sound," that is, exercised not arbitrarily, tempered with due regard for right and equity, and directed by reason and conscience.[251]

Having illustrated the purposes and functions of bail, the study focuses now on the constitutional and statutory measures which give the theory form and effect.

## III. The Eighth Amendment: A Constitutional Right to Bail?

### a) *The British Colonies and Early States*

It has been shown that bail was not an absolute right in England. Did the colonists or citizens of the confederate states know such a right? If they did, arguably, this would have greatly influenced the framers of the Bill of Rights. In addition, although the excessive bail clause originates in the 1689 English Bill of Rights, an examination of the fundamental laws of the colonies provides a more immediate setting in which to observe the meaning of the clause.

The colony of Virginia followed the criminal procedure of the mother country closely.[252] The first statute specifically pertaining to bail was enacted in 1645.[253] The act required that sheriffs take "sufficient bayle of all persons arrested. . . ." It did not, however, establish a statutory right to bail. In fact, the act was inspired not by a philosophy in favor of a "liberal-bail" policy, but rather by a plan to attach greater constraints on the principal.[254] The act went on to warn that "if the sheriff shall neglect to take sufficient bayle of the party arrested, or otherwise consent to, or be cause of his escape, then the sheriff shall be liable to pay the award of the court himself. . . ." This clause surely prompted the sheriff into a more cautious position.[255]

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[247] Rule 46(f) subrogated the former rule embodied in 18 U.S.C. § 601. *See* Smaldone v. United States, 211 F.2d 161 (10th Cir. 1954). Even after the seventh committee draft of Rule 46 (first preliminary draft) the proposed law continued to contain the language of the 5 Stat. 321-22 (1839) as revised. The Lawyers Club of Los Angeles suggested that discharge of forfeiture be allowed where the surety acted conscientiously and quickly in locating the willfully (or otherwise) defaulting defendant. *See* 2 Recommendations and Suggestions Concerning the Preliminary Draft of the Federal Rules of Criminal Procedure 531. The Judicial Conference of the Fifth Circuit suggested that the court be given authority to set aside forfeiture "if it appears that a trial can be had and that justice does not require the enforcement of the forfeiture." 4 *id.* at 89.

[248] Although the Rule has been thrice amended (1956, 1966, and 1972), subsection (f)(2) has remained the same, though in the 1972 version it was lettered (e)(2).

[249] The Rule did not operate retroactively. United States v. Rock, 16 F.R.D. 275 (1954).

[250] Brown v. United States, 410 F.2d 212 (5th Cir.), *cert. denied*, 396 U.S. 932 (1969).

[251] United States v. Davis, 202 F.2d 621 (7th Cir.), *cert. denied*, 345 U.S. 998 (1953).

[252] *See generally* A. Scott, Criminal Law in Colonial Virginia 62 (1930).

[253] 1 Va. Stat. 305 (W. Hening ed. 1823).

[254] A similar statute was enacted in Maine in 1679 and 1682. 3 Province and Court Records of Maine 34, 71 (R. Moody ed. 1947).

A more progressive bail policy began to emerge in the eighteenth century. In 1705, "An Act for removing criminals from the gaoles of the counties where they shall be apprehended, to the public gaol at Williamsburg" was enacted.[256] The act provided, *inter alia*, that:

> [W]hen any prisoner shall, by the court, be remanded to the county gaol . . . if the offense be of such a nature, as the prisoner may be admitted to bail; then, and in such case, he or she shall not be removed out of the county, to the said public gaol, in less than 20 days after such remanding: To the end, that in that time, bail may be procured and given in the county.[257]

Virginia's traditional affection for the common law established the Statute of Westminster I[258] as the core of the law defining which offenses were bailable.[259] By requiring that the prisoner not be removed for twenty days from the county where the alleged crime had been perpetrated, the prisoner was allowed to remain in an area where presumably he would have more friends, *i.e.*, potential bail, than in the capital. Five years later, the famous Habeas Corpus Act was extended to the colony.[260] In 1732, all judges or justices of the General Court were empowered to take bail, in term or outside of term.[261]

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[255] The act further provided that if sufficient bail were taken, and the party defaulted, "then judgment shall be awarded against the bayle. . . ." If, however, the bail produced the principal at the following session, "[t]he bayle shall then be acquitted. . . ." The statute was reenacted with minor changes in 1657, *id.* at 448-49, and in 1661, 2 *id.* at 79. *See also* 2 *id.* at 247 for corrections in the 1661 statutes. An enactment of the following year provided, "WHEREAS by the law of this country all appellants from any court are bound to prosecute their appeales, but leaves the defendants at their liberty without any security to make it his appearance. Be it therefore enacted that henceforth all defendants in appeales shall give bayle for their appearance as in case of arrests, and the sherriffe and bayle be lyable for non-appearance as in case of arrests." *Id.* at 169.

[256] 3 *id.* at 389.

[257] 3 *id.* at 391. The act continued: "nothing herein contained, shall be construed so as to exclude or hinder any person from being admitted to bail, after his or her removal into the said public gaol, in such case as by law he or she may be bailable."

[258] The most striking bail case of the colonial period in Virginia was in 1766. There, a prominent and influential man in the colony, Colonel John Chiswell, initially was denied bail by the Examining Court, but before Chiswell was confined, his friends persuaded three judges of the General Court to release him. The act was challenged, but it was clear that since the General Court possessed powers parallel to those of the King's Bench, the judges were not limited by the statutory guidelines defining bailable offenses. A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 63-64 (1930).

[259] In the preamble to the revision of the statutes of 1660-1661, it was declared, "[w]e have endeavored in all things (as near as the capacity and constitution of this country would admit) to adhere to these excellent and often refined laws of England to which we profess and acknowledge all our obedience and reverence." C. WARREN, A HISTORY OF THE AMERICAN BAR 39 (1911 ed).

[260] ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776, at 334-36 (L. Labaree ed. 1935); *see also id.* at 336-37, No. 446.

[261] 4 Va. Stat. 327 (W. Hening ed. 1823).

In Massachusetts, the *Body of Liberties* (1641) exaggerated the twenty-ninth Chapter of the Magna Carta by ordaining that no one was to be restrained or imprisoned before conviction and sentence "if he can put in sufficient security, Bayle or Mainprise for his appearance, and good behavior in the meantime. . . ."[282] However, this was a very limited statutory right to bail.[283] The purview of the statute did not comprehend capital offenses, contempts of court, and instances excluded by express act of the legislature.[284]

The arbitrary and capricious regime of Sir Edmund Andros (Governor, 1686-1688) provided impetus for the introduction and expansion of knowledge about the common law. In response to the governmental policies under Andros, the colonists began to assert rights protected by English law, such as habeas corpus. The Charter of 1691 reasserted the guaranteed rights to the liberties of Englishmen.[285] But Englishmen in England or elsewhere were not guaranteed a blanket right to bail.

The colonial *Charter of Liberties and Privileges of New York* (1683) contained an article which guaranteed bail in all cases, except treason and felony.[286] However, the *Charter* was denied sanction by the Committee of Trade and Plantations.[287] New Yorkers continued to press for reform, and in 1691, they were able to push through the provincial legislative council a second declaration of rights, which repeated the 1683 proposal.[268] The legislative measure did not, however, possess the permanent character of a charter right.[269] In practice, treason[270] and murder[271] were not bailable, and grand larceny was usually irreplevisable.[272] In other cases, no distinction seems to have existed between felony and misdemeanor.[273] Even in the petitions of prisoners who languished in jail without indictment, there was no insistence upon a right to bail.[274]

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[282] The article was part of a group of laws designed, according to Winthrop, to resemble the Magna Carta and "should be received for fundamental law." G. Haskins, Law and Authority in Early Massachusetts 36 (1960). It was renewed in 1671. Compact, Charter, and Laws of the Colony of New Plymouth 255-56 (Boston ed. 1836).

The area now known as New Hampshire was within the coverage of the 1641 Body of Liberties. 1 Laws of N.H. 754 (1641). During the administration of Cranfield (1682-1686) the arbitrary administration of justice was a source of complaint. It was charged that those who offended the governor were imprisoned and compelled to give heavy bail, even when no crime was charged against them. *See* W. Fry, New Hampshire as a Royal Province 434, 443-44 (1908).

[283] *See* Foote, *The Coming Constitutional Crisis in Bail (Pt. I)*, 113 U. Pa. L. Rev. 959, 970 (1965).

[284] M. Farrand, Laws and Liberties of Massachusetts 28 (1929). It should also be said that the list of capital offenses was extensive. A 1636 statute listed the following as capital offenses: treason, willful murder, burning of ships and houses, sodomy, rape, buggery, and adultery. *See* Compact, Charter and Laws of the Colony of New Plymouth 42-43 (Boston ed. 1836). In 1671, the following list was in effect: idolatry, blasphemy, witchcraft, murder, murder through guile, beastiality, sodomy, rape, man stealing, false witness, conspiracy, willful firing at a dwelling or house, cursing or smiting parents by children, and rebelliousness by a son. *Id.* at 243-45. In 1676, selling guns to Indians was added to the list. *Id.* at 178. Later acts denied bail to those convicted of forgery, 1 Acts and Resolutions of the Province of Massachusetts Bay 53, perjury, *id.* at 54, and witchcraft, *id.* at 91. Bail was also denied soldiers duly impressed but failing to appear to summons, *id.* at 399, persons committed for nonpayment of taxes, *id.* at 94, 164, 410, persons convicted of breach of license laws, *id.* at 191 and bankrupts refusing to take the oath, or to disclose the full truth after being sworn, *id.* at 727. *See generally* G. Haskins, Law and Authority in Early Massachusetts 198 (1960).

[285] 3 Thorpe, *supra* note 8, at 1881.

[286] 1 Colonial Laws of New York 114 (Albany ed. 1894-1896). In addition, the article provided that bail could not be used to discharge anyone who had been imprisoned by judgment of any court of record within the province or taken in execution for debts.

[287] 3 Documents Relative to the Colonial History of the State of New York 357 (J.R. Brodhead ed. 1853).

The New York provision of 1683 was patterned after article XI of the *Frame of Government of Pennsylvania* (1682).[275] The Pennsylvania article provided "[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great." This did not insure a constitutionally guaranteed right to bail[276] since the word "bailable" merely denotes a discretionary policy towards bail.

In 1705, the 1682 Pennsylvania provision was amended. The early 18th century enactment made all prisoners bailable "by one or more sufficient sureties, to be taken by one or more of the Judges or justices that have cognizance of the fact, unless for such offenses as are made felonies of death by the laws of this province." The Act also required that in every county, at least every six months, there shall be held a gaol-delivery. If anyone were found to be imprisoned or prosecuted without probable cause, he or she was to have double damages against the informer or prosecutor.[277]

The colonial charters of Connecticut (1662),[278] Delaware (1701),[279] Georgia

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[268] 1 Journal of the Legislative Council of New York 1691-1743, at 8 (Albany ed. 1861); *see* Acts of the Assembly of New York, 1691-1718 (1719). The 1691 act defined felony as actions "restrained from Bail by the Laws of England." The system of bail prior to the enactment of 1691 was regulated by the Laws of the Duke of York (1665-1675). One provision warned that to "Bayle" contrary to law is finable. Letting to bail in offense of law was interpreted as releasing those confined by special warrant, or for a capital offense. *See* Colonial Laws of New York 17 (1894-1896).

[269] *See* J. Goebel, Jr. & T. Naughton, Law Enforcement in Colonial New York 497-506 (1970). Note especially the discussion of the Trial of John Peter Zenger (*King v. Zenger*). *Id.* at 504. The case is interesting not only for examining the constitutional history of freedom of the press, but it is also interesting in an analysis of the development of the American system of bail. Zenger was arrested under a warrant issued by the Governor and Council. On return of habeas corpus, Zenger's attorney, Andrew Hamilton (a barrister and bencher of Grey's Inn), argued for bail on the basis of the Magna Carta, the Petition of Rights, the Habeas Corpus Act, and the Bill of Rights. Bail was granted in the sum of £400, plus two sureties at £200 each. Unable to raise the large sum, Zenger was remanded pending trial. *Id.*

[270] *Id.* at 498-99.

[271] *Id.* at 499-500.

[272] *Id.* at 500.

[273] *Id.* at 500-01.

[274] *Id.* at 502.

[275] 5 American Charters 3061 (F. Thorpe ed. 1909). The bail provision in the ordinance governing the Northwest Territory (1707) was similar to the section in the Pennsylvania Charter of 1682.

[276] *Contra*, Meyer, *Constitutionality of Pre-Trial Detention*, 60 Geo. L.J. 1139, 1163 (1972).

[277] 1 Laws of Pennsylvania 56 (Phil., ed. 1810).

[278] 1 American Charters 533 (F. Thorpe ed. 1909). In 1672, a Connecticut statute entitled "An Act concerning Imprisonment," patterned after the Massachusetts Body of Liberties of 1641, was enacted. *See* The General Laws and Liberties of Connecticut Colony 32; or Acts and Laws

(1732),[290] Maine (1639),[291] Maryland (1632),[292] and Rhode Island (1663)[293] guaranteed that the subjects of the colony would enjoy the same liberties and immunities as if they had been born within the realm of England. Other colonial charters implied as much.[294] However, Englishmen in the homeland possessed no right to bail beyond that allowed by the legislature.

When the colonies asserted their independence in 1776, they continued the system of bail as it had been known. Section 9 of the Virginia Constitution of 1776 was typical of the bail provisions in confederation constitutions. It demanded simply that "excessive bail ought not to be required. . . ."[295] The Virginia legislature enacted a statute which gave the constitutional provision definite form in 1785. The act eliminated judicial discretion in determining whether bail should be granted or denied. It required that "those shall be let to bail who are apprehended for any crime not punishable in life or limb. . . . But if a crime be punishable by life or limb, or if it be manslaughter and there be good cause to believe the party guilty thereof, he shall not be admitted to bail."[296] It would thus seem that the provision prohibiting "excessive bail" was directed against the judicial department. It would have been an ineffective check on a legislative body since they could negate the provision[297] simply

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of Connecticut (1702-1715) at 55. The list of capital offenses was also copied from Massachusetts. *See An Act for the Punishing of Capital Offenses*, General Laws 9-10. *See also An Act for granting liberty to Criminals brought to the County Court and Condemned there, to have Review* (1706) which allowed the granting of bail on appeal. Acts and Laws of Connecticut (1702-1715) at 131. *See also* Acts and Laws of Connecticut (1750) at 42 (Act concerning delinquents).

[289] 1 American Charters 559 (F. Thorpe ed. 1909). A statute of 1731 required bail in all but capital cases. 4 Geo. 2, c. 56a; 1 Laws of Delaware (1700-1797) at 135.

[290] 2 American Charters 773 (F. Thorpe ed. 1909).

[291] 3 *id.* at 1635.

[292] 3 *id.* at 1681.

[293] 6 *id.* at 3220. *See also* Acts and Laws of His Majesty's Colony of Rhode Island and the Province-Plantations in New England in America (1745-1752) at 70-71, incorporating, *inter alia*, the provisions in the Statute of Westminster I relating to bail.

[294] 4 American Charters 2442 (F. Thorpe ed. 1909) (*Grant of the Province of New Hampshire to Mr. Mason* (1635)); 5 *id.* at 2538 (*Concession and Agreement of the Lord Proprietors of New Jersey* (1664)); also pertaining to New Jersey was *id.* at 2591-92 (*Exemplification of Charles II's Grant to the Duke of York, by Queen Anne* (1712)); *id.* at 2746, 2755 (*North Carolina Charter of 1663*); *id.* at 2758 (*The Concessions and Agreements of 1665*); *id.* at 2765 (*The North Carolina Charter of 1665*). The Charter provisions cited require that the colony conform to the laws of England.

North Carolina followed the aggregate rule of several British statutes. *An Act to Put in Force in this Province, the Several Statutes of the Kingdom of England or South-Britain, therein particularly mentioned* (1749) included 9 Hen. 3, c. 29; 1 Rich. 3, c. 3; 3 Hen. 7, c. 2; 1 & 2 Phil. & M., c. 13; 31 Car. 2, c. 2; 1 Wm. & M., c. 2. Cited by Brown, British Statutes 306. *See also* Laws of North Carolina 10, for a 1715 enactment allowing bail in "bailable" cases.

[295] 7 American Charters 3813 (F. Thorpe ed. 1909).

[296] 12 Va. Stat. 185-86 (W. Hening ed. 1823). Section 3 went on to warn: "[i]f any justice let to go at large on bail any who is not bailable, or refuse to admit to bail any who have right to be so admitted, after shall have offered sufficient bail, or require excessive bail, he shall be amerced at the discretion of the jury." The statute implicitly recognizes the difference between a guaranteed right to bail and a guaranteed right against excessive bail.

[297] In 1781, the legislature empowered the Governor, with the advice of the Council, "to

by stating that there shall not be granted bail in any case.

An examination of the provisions pertaining to bail in the constitutions of Maryland (1776),[288] Massachusetts (1780),[289] and New Hampshire (1784)[290] lends credence to the proposition that the statesmen responsible for the drafting of the early American constitutions perceived the "excessive bail" clause as a limitation on the judiciary and not the legislature. The Maryland Constitution stated "[t]hat excessive bail ought not to be required . . . by *courts of law*." (Emphasis added). The provisions of the constitutions of Massachusetts and New Hampshire read: "*No magistrate or court* of law shall demand excessive bail or sureties . . . ." (Emphasis added). Support for the proposition can also be gathered from section 29 of the Pennsylvania Constitution of 1776, which directed that "Excessive bail shall not be exacted for *bailable offenses*."[291] (Emphasis added). Pennsylvania's article was duplicated by the Vermont constitutional framers who assembled at Windson on July 2, 1777.[292]

Two of the embryo states followed the example of Virginia in simply declaring excessive bail unconstitutional.[293] The remainder emulated article 25 of the Delaware Constitution of 1776 in declaring that "The Common law of England, as well as so much of the statute law which had been heretofore adopted in practice in the State, shall remain in force."[294]

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apprehend or cause to be apprehended and committed to lose confinement, any person or persons whatsoever, whom they may have just cause to suspect of disaffection to the independence of the U.S. (*sic*) or of attachment to their crimes, and such person or persons shall not be set at liberty by bail, mainprise or habeas corpus." 10 *id.* at 414.

[288] 3 AMERICAN CHARTERS 1688 (F. Thorpe ed. 1909).

[289] *Id.* at 1892. *See* the enactment of 1785, LAWS OF MASSACHUSETTS 238 (Boston ed. 1807), which supplements the Constitutional provision of 1780.

[290] 4 AMERICAN CHARTERS 2457 (F. Thorpe ed. 1909).

[291] 5 *id.* at 3089. Four years after the adoption of this constitution, Pennsylvania adopted *An act to increase the punishment of horse stealing* (1780). Section IV of the act provided that "no person or persons, who shall be charged with the stealing of any horse, mare or gelding, on the direct testimony of one witness, or who shall be taken with such horse, mare or gelding, in his or her possession, shall be admitted to bail, otherwise than by one or more Justices of the Supreme Court." 1 LAWS OF PENNSYLVANIA 501 (Phil. ed 1810).

[292] 6 AMERICAN CHARTERS 3746 (F. Thorpe ed. 1909). Work on the Vermont document was completed six days later. It was not, however, submitted to the people for ratification. It was simply affirmed by the legislature in 1770 and 1782 and declared part of the laws of the state.

[293] 2 *id.* at 785 (Georgia 1777). *Compare with* Act of 1793 denying bail to those charged with horse theft. A DIGEST OF THE LAWS OF GEORGIA 531 (1801); 5 AMERICAN CHARTERS 2788 (North Carolina 1776).

[294] 1 AMERICAN CHARTERS 566-67 (F. Thorpe ed. 1909). *See also* 5 *id.* at 2593 (New Jersey 1776); *id.* at 2785 (New York 1777). Giving definite form to the constitutional provision were two enactments of 1787. On January 26, 1787, *An Act concerning the Rights of the Citizens of this State* provided, among other things, "that excessive bail ought not to be required. . . ." Less than three weeks later it was declared illegal for sheriffs and others having custody of prisoners to release or bail "any person arrested . . . for any treason or felony, or misprison of treason, or upon any condemnation, execution of *capias utlagation*, or for surety of the peace; or any person taken, or arrested, or to be taken, arrested or committed, by special commandment of any court or justice, upon pain of being punished by fine and imprisonment. . . ." Section II of the Act was almost identical to 23 Hen. 6, c. 9 (1444). 1 LAWS OF NEW YORK 290, 350 (Greenleaf 1st ed. 1776); 6 AMERICAN CHARTERS 3247 (F. Thorpe ed. 1909) (S. Carolina 1776).

In sum, by the time of the formulation of the Bill of Rights by the first Congress of the United States, the experience in America had been to grant bail in cases which were bailable, as determined by the legislature. There was no constitutionally guaranteed right to bail in England or in the American colonies or states during this period; nor had such a safeguard ever been inaugurated into Anglo-American jurisprudence prior to this period.

### b) *The Bill of Rights*

The delegates assembled at the Philadelphia Convention of 1787 did not conceive of a bill of rights as intrinsic to the establishment of a more perfect government. There was no direct motion for the incorporation of distinct and explicit guaranteed individual liberties during the debates.[295] It was believed that since the Constitution, if adopted, would not repeal the state declarations of rights, adoption of a federal bill of rights was superfluous.[296]

Immediately following the Philadelphia convention, however, there was criticism of the proposed constitution for its want of a bill of rights. At the North Carolina ratifying convention, McDowall insisted upon a bill of rights as a requisite element in safeguarding those rights not relinquished to the government.[297] Iredell countered by asserting that under a constitution where the people surrender only a limited power to the government there was no need for a bill of rights. Iredell suggested that incorporation of a bill of rights would prove detrimental to liberty since it would be impossible to enumerate all the individual rights not relinquished by the Constitution, and the omission of some rights could raise the question of their very existence.[298] Spenscer suggested a compromise. He considered the addition of a bill of rights unnecessary if a clause were added to the Federal Constitution guaranteeing that all rights not surrendered to the central government would be reserved to the states.[299] In the end it was resolved that a declaration of rights should be laid before Congress and that a convention of the states should be called for the purpose of amending the Constitution before ratification of the document by North Carolina. Among the amendments recommended by North Carolina was one ordaining that "excessive bail ought not to be required. . . ."[300]

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[295] On Sept. 12, 1787, only five days before adjournment, Colonel Mason raised the subject by remarking that a bill of rights "would give great quiet to the people, and with the aid of the state declarations, a bill might be prepared in a few hours." 5 ELLIOT, DEBATES 538. Gerry concurred, however the subject was tabled for reasons presented by Sherman. *See* text accompanying note 296 *infra*.

[296] 5 ELLIOT, DEBATES 538.

[297] 4 *id.* at 210-12.

[298] *Id.* at 149.

[299] *Id.* at 163, 168. The suggestion perhaps later gave form to the ninth amendment to the United States Constitution.

[300] *Id.* at 244. Virginia also recommended the adoption of certain amendments; however, one containing an "excessive bail" clause was not among those suggested. Randolph dissented from the recommendation of the majority. He deemed a bill of rights necessary only in a government that had deviated from its fundemental principles. 3 *id.* at 466-67. For example, he proposed that the guarantee against excessive bail "would follow of itself without a bill of rights." He

Though to many, the lack of a bill of rights was the Constitution's greatest defect, the majority of the conventions spent little time in discussing it.[381] But the want of a bill of rights was an escalating source of malcontent to the people. In response to this situation, in June 1789, Madison proposed that the House resolve itself into a Committee of the Whole to consider amendments to the Constitution of the United States.[382] One of the suggested amendments read in part: "Excessive bail shall not be required. . . ."[383]

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conceived that "Numbers are the highest security in our Constitution." *Id.* at 467. George Nicolas also perceived a bill of rights as no security. "It is but a paper check," reasoned Nicolas, for it "has been violated in many . . . instances." *Id.* at 450. In this interpretation, John Marshall concurred: "[t]he bill of rights is merely recommendatory. Were it not otherwise, the consequence would be that many laws which are found convenient would be unconstitutional." *Id.* at 561. Despite these arguments, amendments were suggested. *See* remarks of Patrick Henry, *id.* at 445.

New Hampshire, New York, and Rhode Island also criticized the absence of a bill of rights. Rhode Island refused, in fact, to send a delegation to the Convention. There was also criticism in South Carolina, but the instrument was ratified by a two-to-one margin. *See* remarks of Patrick Dollard and James Lincoln, 4 *id.* at 336-38 and 312-15, respectively. *Compare* those arguments *with* comments of General Charles Cotesworth Pinckney. *Id.* at 315-16. The conventions of Massachusetts, Pennsylvania, and Connecticut accepted the document as it was.

[381] Mention of the absence of a declaration of rights does not appear until Hamilton's message to the People of New York in Federalist 84—the last letter before the summary. Hamilton argued that "the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights." In a government of delegated powers, there "is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government." THE FEDERALIST No. 84 (A. Hamilton), at 264 (R. Fairfield ed. 1966).

[382] 1 CONG. DEB. 424 (Gales & Seaton eds. 1834).

[383] *Id.* at 434. Foote, *The Coming Constitutional Crisis in Bail (Pt. I)*, 113 U. PA. L. REV. 959 (1965), identifies the three alternative interpretations of the eighth amendment: (1) Bail cannot be demanded in an excess sum in cases made bailable by other provisions of law, but the clause itself imports no right to bail; (2) Bail cannot be demanded in an excess amount in cases in which the court sets bail, but in the absence of other statutory or constitutional restrictions the court retains discretion to deny bail altogether; (3) The provision suggests an absolute right to bail. Foote considers this third alternative the most congruent with history. He argues that the language of the eighth amendment was lifted incompletely (by Mason, whether inadvertently or because he did not have his references at hand when he drafted the amendment, or because he was not technically trained as a lawyer) from the 1689 English Bill of Rights. Foote maintains that "critical language which is in the preamble of the English Bill of Rights, that clearly spells out the basic right to bail makes the prohibition of excessive bail merely a dependent clause upon an existing non-discretionary statutory right to bail. Thus, Mason's English source combined both the right to bail, drawn together from enactments which in England went back to 1215. . . ." C. Foote, *Testimony Before Subcommittee of Judiciary Committee of the Senate, reprinted in* Urban Research Corp., PREVENTATIVE DETENTION 324 (1971). *See also id.* at 161 (Senator Samuel Ervin's comments). First, there was no clause in the preamble of the English Bill of Rights which guaranteed bail in all cases as a right. This was never the practice in England. The Statute of Westminster I (1275), the backbone of the law of bail in England, was enacted as much to check the granting of bail in certain cases as it was to guarantee it in other cases. The Habeas Corpus Act, enacted only ten years before the 1689 Bill of Rights, required that bail be granted "unless it appear . . . that the Party [is] so committed . . . for such Matter or Offenses for which by Law the Prisoner is not bailable." Second, Virginia, the immediate

Congressional representatives were not enthusiastic about Madison's proposal. It was suggested that the motion be deferred to "enable the House to enter upon business better prepared than could be the case by a sudden transition from other important concerns to which their minds were strongly bent."[304] Another member of the House considered the Constitution too young to disturb.[305] Other members argued that the business of revenue, and the matter of organizing the executive and judicial branches were more important at this point.[306] Livermore supposed that "the judiciary law would contain certain regulations that would remove the anxiety of the people respecting such amendments as related thereto."[307] Debate on the proposal was thus deferred until July 21.

Meanwhile, the Senate was preparing the bill on the judicial system. Drafting of the bill had begun on April 7, 1789.[308] It was reported out of committee four days after Madison's introduction of amendments to the Constitution in the House.[309] Debate in the Senate was completed on July 17, and the bill was sent to the House. One section of the Senate bill guaranteed that:

Jud. Act.

> upon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law.[310]

Jud. Act.

Consideration of the bill was deferred for one month. Since some of the amendments pending in the House were consanguineous to several parts of the Judiciary Bill, it was conceivable to some that if those amendments were adopted, the bill would require modification.[311]

Thus, when the House commenced debate on the proposed amendments, the Judiciary Bill was before them. There is nothing in the debates to indicate that "excessive bail" was meant to extend further than the words alone

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source of the "excessive bail" clause for the framers of the eighth amendment, did not interpret the clause as conferring a guaranteed right to bail. *See* text accompanying note 287 *supra*. Finally, even if the clause were lifted imperfectly from the English Bill of Rights, those who voted for the amendment were voting for it as it stood and not in its original setting.

[304] 1 CONG. DEB. 424 (Gales & Seaton eds. 1834).

[305] *Id.* at 425 (Mr. Jackson).

[306] *Id.* at 427-28 (Mr. Sherman); *id.* at 429-30 (Mr. Vining).

[307] *Id.* at 447.

[308] *Id.* at 18.

[309] *Id.* at 46.

[310] Judiciary Act of 1789, ch. 20, 1 Stat. 73, 91. On the history of the Judiciary Act of 1789, see Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) [hereinafter cited as Warren].

[311] Warren, *supra* note 310, at 111. Warren writes: "It was clear that the action of Congress on these Amendments would have a considerable effect upon the action which the House should take on the Judiciary Bill. Should the more radical Amendments desired be adopted, considerable portions of the Judiciary Bill, as it has passed the Senate, would become unnecessary. . . ." If by "excessive bail" the representative had understood a guaranteed right to bail, the section of the Judiciary Act pertaining to bail would have been eliminated as unnecessary. *See* Livermore's remarks at text accompanying note 307 *supra*.

import. The only mention of the clause during the debates was by Mr. Livermore, who remarked: "The clause seems to have no meaning to it, I do not think it necessary. What is meant by the terms excessive bail? Who are the judges . . . ?"[312] The comment inspired no further debate. On August 22, the amendments agreed upon were sent to the Senate,[313] and on September 25, the two Houses concurred on twelve amendments.[314]

On the same day that the House passed the Bill of Rights, the Judiciary Bill was taken up. Without any substantial modification, the bill was passed. No debate on the section guaranteeing bail in non-capital cases transpired. Though the Bill of Rights did not take effect until December 15, 1791, the same basic pattern as that which took place in Virginia (the first state to adopt the "excessive bail" prohibition of the English Bill of Rights and the home state of the draftsman of the Bill of Rights) is observable, *i.e.*, a constitutional provision succeeded by a statutory supplement.

### c) *The Meaning and Operation of the Eighth Amendment*

Note:

The eighth amendment's interdiction against excessive bail is an anomaly among liberties guaranteed by the Bill of Rights. History clearly indicates that the constitutional palladium under study does no more than prohibit the setting of excessive bail in cases prescribed bailable. The clause is, therefore, not self-executing.[315] It requires the legislation of Congress creating the right to bail to lend it sustenance.[316] The extension of this interpretation results in the conclusion that the constitutional right is merely auxiliary to statutes which grant a qualified right to bail.[317]

The Supreme Court first hinted at its concurrence with the historical meaning given the eight amendment in *Ex parte Watkins*.[318] The Court there stated that "the Eighth Amendment is addressed to the courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion."[319] This view implicitly recognized that the amendment is an ineffective safeguard against Congress.[320] Although the amendment limits the discretion of the courts in setting bail, Congress is free to determine the cases for which bail shall be allowed, or whether it shall be allowed at all.

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[312] 1 CONG. DEB. 754 (Gales & Seaton eds. 1834).

[313] *Id.* at 778.

[314] *Id.* at 788.

[315] *But see* Trimble v. Stone, 187 F. Supp. 483, 485 (D.D.C. 1960), where District Judge Holtzoff wrote, "[t]he Eighth Amendment is self-executing. . . ."

[316] United States v. Hudson, 65 F. 68, 77 (W.D. Ark. 1894).

[317] Foote, *The Coming Constitutional Crisis in Bail (Pt. I)*, 113 U. PA. L. REV. 959, 969 (1965), finds such an interpretation incredible. "It requires one to believe that a basic human right would be deliberately inserted in a constitution in a form which permitted Congress to restrict it at will, or even to render the eighth amendment entirely moot by enacting legislation denying the right to bail in all cases."

[318] 32 U.S. (7 Pet.) 568 (1833).

[319] *Id.* at 574.

[320] *See* Carlson v. Landon, 342 U.S. 524, 525 (1952).

Numerous decisions after *Watkins* have followed its doctrine. In *Prentis v. Manoogian*,[321] the court observed that the absolute right to bail depended upon statutes, since at common law bail was not a matter of right.[322] This view was expounded in the celebrated New York case of *People ex rel Shapiro v. Keeper of City Prisons*.[323] Shapiro was charged with extortion. A lower court refused to grant bail pending trial because the accused had a record of seven prior convictions.[324] The New York Court of Appeals decided that the "excessive bail" clause of the state constitution[325] did not mandate the release of the defendant on bail. The determination of bailable cases, according to the court, was reserved to the legislature. While the court agreed that, as a matter of logic, it may seem that the constitutional requirement implied a right to reasonable bail in all cases, it went on to note that the history of the law of bail negates such an interpretation. The reference to "excessive bail," wrote Justice Desmond, "referred only to amount of bail."[326]

Clearly, the "excessive bail" clause does not establish a right to bail. Nor can it be argued that the putative right is a blanket guarantee.[327] From the passage of the Judiciary Act of 1789,[328] the courts, in the granting of bail in capital cases, have been allowed discretion.[329] The courts also possess discretionary power in the consideration of applications for bail pending appeal.[330] Thus, although the Constitution forbids bail that is excessive, courts may constitutionally refuse to set bail at all. Therefore, in cases where the courts are given discretion to grant or refuse release on bail, there are two separate questions: is the defendant to be released at all, and if so, for what amount of bail? It is only when the judge in his discretion answers "yes" to the first question that he comes to, and is constitutionally limited as to, the amount of bail.

Courts expousing a "constitutionally protected absolute right" theory of bail, however, have assumed a more restricted posture by designing their own parameters. In *United States v. Motlow*,[331] Motlow and thirty-eight other persons were convicted of conspiring to violate the National Prohibition Act. Pending appeal, Henry Levin and nine others petitioned for bail. Granting the request, Justice Butler, as circuit justice, read the eighth amendment as implying and therefore safeguarding "the right to bail at least before trial."[332] Butler reasoned that since the purpose of the eighth amendment was to prevent a court from denying bail in fact by establishing the amount of bail so unreasonably high that it could not be satisfied, the provision "would be futile if magistrates were left to deny bail."[333]

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[321] 16 F.2d 422 (6th Cir. 1926).

[322] *See also* United States v. Steward, 2 U.S. (2 Dall.) 343 (1795); United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946); *In re* Lamar, 294 F. 688 (D.N.J. 1924).

[323] 290 N.Y. 393, 49 N.E.2d 498 (1943).

[324] The prior convictions included three felonies. Thus, conviction on the extortion charge, a fourth felony, would subject the defendant to a life sentence. *Id.* at 396, 49 N.E.2d at 499.

[325] N.Y. CONST. art. 1, § 5.

[326] 290 N.Y. 393, 398, 49 N.E.2d 498, 500 (1943).

[327] Case of Davis, 7 F. Cas. 63 (C.C.D. Va. 1871) (No. 3,621a).

[328] Ch. 20, 1 Stat. 73, 91 (1789).

[329] Today the discretionary power is regulated by 18 U.S.C. § 3148 (1970), which reads in part,

> A person . . . who is charged with an offense punishable by death . . . shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

*See* notes 495-502 and accompanying text *infra.*

[330] *See generally* notes 503-74 and accompanying text *infra.*

[331] 10 F.2d 657 (7th Cir. 1926).

This confusion was perpetrated by the absence of a clear decision by the Supreme Court on the issue. The Court steadfastly had avoided the constitutional issue for one hundred sixty-four years.[334] This was possible because there have been statutory guidelines for bail in existence for longer than the presence of the "excessive bail" clause in the Constitution.[335]

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Finally, in 1951, the issue was squarely before the Supreme Court.[336] Pending final determination of their deportability, certain alien members of the Communist party were denied bail by the Director of Immigration and Naturalization, who was exercising power delegated to the Attorney General by Congress.[337] The Supreme Court granted certiorari to review the dismissal of the defendants' application for a writ of habeas corpus.

The petitioners argued that denial of bail violated the eighth amendment. The government countered that the eighth amendment did not require that the petitioners be released on bail, and further, that the power to establish which cases are bailable rested with Congress. Justice Reed, for the majority, rejected the notion of a constitutionally guaranteed right to bail.[338] The Court held that the legislature was not inhibited from identifying classes of bailable and nonbailable crimes.[339]

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[332] *Id.* at 659.

[333] *Id.* In addition, Butler commented,

> Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the court of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor. If these writs of error were taken merely for delay, bail should be refused; but, if taken in good faith, on grounds not frivolous but fairly debatable, . . . then petitioners should be admitted to bail.

*Id.* at 662.

[334] The doctrine has been defined best in *Ashwander v. Tennessee Valley Authority.*

> The Court will not pass on a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional or general law, the Court will decide only the latter.

297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[335] *See* notes 307-14 and accompanying text *supra.*

[336] Carlson v. Landon, 342 U.S. 524 (1952).

[337] Authority was based on section 23 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 1011, which reads, in part,

> Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. . . .

[338] The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but

Not all judges have accepted the view expounded in *Carlson*. In *Trimble v. Stone*,[340] a district court case decided only nine years later, Judge Holtzoff pronounced the right to bail a constitutionally protected right: "This clause has invariably been construed as guaranteeing the right to bail by necessary implication. . . ."[341] However, the consensus is clearly behind the interpretation of history.[342] Thus, a right which Justice Douglas has called "basic to our system,"[343] and which has been identified as "expressive of the spirit of our institutions and our mode of government,"[344] is, inauspiciously enough, not a constitutionally protected right. The constitutionally protected right is merely a guarantee against bail that is "excessive."[345]

Trimble

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> merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said to indicate any different concept.

Carlson v. Landon, 342 U.S. at 545.

[339] *Id.* Justice Black, in dissent, found the holding a "shocking disregard" of the Bill of Rights. *Id.* at 548. He noted that under such an interpretation, only the courts are restrained by the clause. He acknowledged that it was possible that the literal language of the framers connotes such a "weird, devitalizing interpretation . . ."; however, he suggested a more liberal method of interpretation when dealing with the provisions of the Bill of Rights—"obviously designed to protect the individual from governmental oppression." *Id.* at 556. Justice Burton, in a separate dissent, suggested that not only does the eighth amendment prohibit excessive bail, it likewise insures against the unreasonable denial of bail: "The Amendment cannot well mean that, on one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing." *Id.* at 569.

[340] 187 F. Supp. 483 (D.D.C. 1960).

[341] *Id.* at 484.

[342] *See* United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203 (S.D.N.Y. 1969). There the court denied bail to petitioner indicted on a triple murder in the first degree. In rejecting the contention that the accused was being denied a constitutionally protected right which exists in all cases, except those deemed capital, the court held,

> The Eighth Amendment . . . does not mention, much less distinguish between, capital and other felonies. . . . It is true . . . that some courts have construed the Eighth Amendment to guarantee the right to bail on all but capital cases, but such statements must be considered in the context of the Congressional statute governing bail, rather than as a command under the Eighth Amendment.

*Id.* at 205. *See also* United States v. Smith, 444 F.2d 61 (8th Cir.), *cert. denied*, 405 U.S. 977 (1971); Bloss v. Michigan, 421 F.2d 903, 905 (6th Cir. 1970); Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir. 1964); Pilkinton v. Circuit Court of Howell County, 324 F.2d 45 (8th Cir. 1963); Wagner v. United States, 250 F.2d 804, 805 (9th Cir. 1957); Burgess v. Roth, 387 F. Supp. 1155, 1162 (E.D. Pa. 1975); Tunnell v. Wiley, 369 F. Supp. 1260, 1264 (E.D. Pa. 1974); United States *ex rel.* Sullivan v. Aytch, 355 F. Supp. 630, 642 (E.D. Pa. 1973); Koen v. Long, 302 F. Supp. 1383, 1391 (E.D. Mo.), *aff'd*, 428 F.2d 876 (8th Cir. 1969); United States *ex rel.* Siegal v. Follette, 290 F. Supp. 632, 635 (S.D.N.Y. 1968); United States *ex rel.* Fink v. Heyd, 287 F. Supp. 716, 717-18 (E.D. La. 1968), *aff'd*, 408 F.2d 7 (5th Cir.), *cert. denied*, 296 U.S. 895 (1969); United States *ex rel.* Smith v. Prasse, 277 F. Supp. 391, 392 (E.D. Pa. 1967); Corbett v. Patterson, 272 F. Supp. 602, 607 (D. Colo. 1967); Wansley v. Wilkerson, 263 F. Supp. 54, 57 (W.D. Va. 1967); Dameron v. Harson, 255 F. Supp. 533, 536-37 (W.D. La. 1966).

[343] Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice, 1955).

[344] United States *ex rel.* Burleigh v. Shaughnessy, 100 F. Supp. 993, 994 (S.D.N.Y. 1951).

[345] *See, e.g.*, Kaufman v. United States, 325 F.2d 305 (9th Cir. 1963).

### (1) *What Constitutes Excessive Bail*

Excessive bail has been defined as an amount beyond that necessary to secure appearance.[346] "The reasonableness of the amount is to be determined by properly striking a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary restraint . . . under circumstances surrounding each particular accused."[347] An interesting illustration of this balancing process is provided by the case of *United States v. Lawrence*.[348]

Lawrence unsuccessfully attempted to assassinate President Jackson. At the arraignment before Chief Judge William Cranch, the charge of assault with intent to kill was proved by the clearest possible evidence. After inquiring as to his property and circumstances, the Chief Judge supposed bail of $1,000 would suffice, as the charge was not a penitentiary offense, as there was no actual battery and Lawrence did not appear to have any property. Fearing that others, sympathetic to Lawrence's cause, might be disposed to bail him, and to let him escape to make another attempt on the life of the President, the District Attorney suggested a larger sum should be set. Cranch noted that there was no evidence before him to induce a suspicion of conspiracy, and observed that the Constitution forbade the establishment of excessive bail. However, Cranch increased the amount to $1,500, stating:

> This sum, if the ability of the prisoner only were to be considered is, probably, too large; but if the atrocity of the offense alone were considered, might seem too small; but taking both into consideration, and that the punishment can only be fine and imprisonment, it seemed to him to be as high as he ought to require.[349]

Lawrence was unable to meet bail and was remanded to custody.[350]

The *Lawrence* case also serves to illustrate the fact that bail is not excessive merely because the defendant is unable to meet it.[351] The determination of

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[346] Stack v. Boyle, 342 U.S. 1, 5 (1951). *See also* United States v. Radford, 361 F.2d 777 (4th Cir.), *cert. denied*, 385 U.S. 877 (1966); White v. United States, 330 F.2d 811, 814 (8th Cir.), *cert. denied*, 379 U.S. 885 (1964); United States v. Galente, 308 F.2d 63, 64 (2d Cir. 1962); Ward v. United States, 76 S. Ct. 1063, 1066 (Frankfurter, Circuit Justice, 1956); United States v. Weiss, 233 F.2d 463, 465 (7th Cir. 1956); Heikkinen v. United States, 208 F.2d 738, 740 (7th Cir. 1953); Forest v. United States, 203 F.2d 83, 84 (8th Cir. 1953); United States v. Field, 193 F.2d 92, 98 (2d Cir.), *cert. denied*, 342 U.S. 894 (1951).

[347] United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002, 1004 (2d Cir. 1946).

[348] 26 F. Cas. 887 (C.C.D.C. 1835) (No. 15,557).

[349] *Id.* at 888.

For another example of this adjustment process, see United States v. Brawner, 7 F. 86 (W.D. Tenn. 1881), in which the court found $5,000 bail excessive for an individual who himself had no property except two small town lots, worth about $75, although his father, upon whom he relied for bail, owned about 240 acres of land and necessary farming stock (the land having been assessed for taxes at about $8-$10 per acre).

[350] Shortly, thereafter, a writ of habeas corpus was awarded and it was shown that Lawrence was insane.

[351] *See* Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967); White v. United States, 330 F.2d 811, 814 (10th Cir.), *cert. denied*, 379 U.S. 855 (1964).

As a federal court of appeals stated, "[w]hile the Constitution provides that bail should not an amount is in the discretion of the court.[351] In establishing an amount, the trial judge has "considerable latitude" in setting a figure between that which is "clearly inadequate"[352] and that which is "clearly excessive."[353] In *Stack v. Boyle,*[354] the petitioners were indicted under the Smith Act[355] for offenses which carried a maximum punishment of five years imprisonment, and a fine

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be excessive, . . . that is not to say that every defendant is entitled to bail." Wagner v. United States, 250 F.2d 804, 805 (9th Cir. 1957).

If an individual is arrested upon a criminal charge and cannot make bail, he has no recourse but to move for trial. United States v. Rumrick, 180 F.2d 575, 576 (1950).

[351] Petition of Johnson, 72 S. Ct. 1028, 1030 (Douglas, Circuit Justice, 1952). *See also* Fernandez v. United States, 81 S. Ct. 642 (Harlan, Circuit Justice, 1961). Although the trial court has a wide degree of discretion when fixing bail within permissible limits, it does not have any discretionary power to fix excessive bail. Heikkinen v. United States, 208 F.2d 738, 742 (7th Cir. 1953).

[352] No corrupt motive can be imputed to a judicial officer because of the smallness of the amount of bail. United States v. Smith, 27 F. 1157 (1836). There, one Fleet Smith was indicted for taking insufficient bail upon a bench warrant. The court held that since the act is not illegal, it would not permit the introduction of evidence which might indicate a corrupt motive.

[353] Forest v. United States, 203 F.2d 83, 84 (8th Cir. 1953). *See also* Stack v. Boyle, 342 U.S. 1, 5-6 (1951).

Mandamus does not extend to cases where a judge has set an amount in his discretion, *Ex parte* David Taylor, 55 U.S. (14 How.) 3 (1853), though it lies to compel him to exercise his discretionary power. Hudson v. Parker, 156 U.S. 277, 288 (1895).

*See also* United States *ex rel.* Estabrook v. Otis, 18 F.2d 689-90 (8th Cir. 1927), wherein the court noted that mandamus will not lie to force the trial judge to grant bail since "such an action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers to whose judgment and discretion the law entrusted the decision of the issue." In a collateral criminal proceeding, where adequate remedies in the criminal process are not exhausted, habeas corpus is also an inappropriate remedy for challenging bail as unconstitutionally fixed. Stack v. Boyle, 342 U.S. at 6-7. Habeas corpus is appropriate, however, where no other remedy is available. United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946). It is also appropriate to proceed by habeas corpus for the purpose of securing admittance to bail. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). It should also be noted that courts may admit to bail a person detained pending determination of habeas corpus proceedings. Principe v. Ault, 62 F. Supp. 279 (N.D. Ohio 1945). This is the case even though application for a writ of habeas corpus is not a criminal proceeding. Further, when a petitioner for habeas corpus bases his petition on the ground that excessive bail was required, and before decision on the writ furnishes bail, the writ will not be granted, as the defendant has already been released. Johnson v. Hoy, 227 U.S. 245 (1913). The proper remedy for reducing excessively established bail is by a motion for a reduction of bail and appeal to a higher court from an order denying such a motion. Under such proceedings, there is no discretion to refuse to reduce excessive bail. Stack v. Boyle, 342 U.S. 1 (1951).

A motion for a reduction of bail pending appeal may be denied after consideration of the appellant's motion, in conjunction with appellee's opposition thereto, and the memorandum of the trial judge. Hairston v. United States, 343 F.2d 313 (D.C. Cir.), *cert. denied*, 382 U.S. 856 (1965). If the rationale which induced the district court to establish an unobtainable bond is not apparent, the court of appeals may deny a motion for the reduction of bail but without prejudice to a renewal before the district court, so that the motion can be properly considered by the lower tribunal. Pelletier v. United States, 343 F.2d 322 (D.C. Cir. 1965). Complaints of excessive bail fixed pending trial cannot be made after conviction. O'Brien v. United States, 25 F.2d 90 (7th Cir. 1928). *See also* Hewitt v. United States, 110 F.2d 1 (8th Cir.), *cert. denied*, 310 U.S. 641 (1940).

[354] 342 U.S. 1 (1951).

[355] Ch. 439, 54 Stat. 670-71 (1940).

of $10,000. Bail was set by the district court in the uniform amount of $50,000 for each of twelve members of the Communist party. Conceding that this was a significantly higher amount than that normally fixed for offenses of comparable penalties, the prosecution argued that the petitioners were all pawns in a conspiracy and would flee the jurisdiction. In applications for habeas corpus the petitioners argued that their eighth amendment rights were being infringed. The Supreme Court ruled that if bail in a higher than normal amount[357] were required, evidence of this necessity should be presented at a hearing. "In the absence of such a showing," wrote Chief Justice Vinson, "the fixing of bail before trial in these cases cannot be squared with statutory and constitutional standards for admission to bail."[358]

### d) *Relationship Between the Eighth and Fourteenth Amendments*

Prior to the adoption of the fourteenth amendment in 1868, the Constitution had little impact on the relationships between state governments and individuals. The Marshall Court held, in *Barron v. Baltimore*,[359] that the Bill of Rights restricted only the national government and did not limit state authority.[360] *Barron* considered the applicability of the fifth amendment to the states. Subsequently, the Supreme Court stated several times that the eighth amendment did not apply to the states. For example, two years prior to the adoption of the fourteenth amendment, the Court in *Pervear v. Massachusetts*[361] summarily rejected the argument that the sentence imposed on Pervear by a state court for the illegal sale and keeping of intoxicating liquors could be challenged as violative of the "cruel and unusual punishment" clause of the eighth amendment.[362] Similarly, in 1891 the Court avoided an eighth amendment challenge against solitary confinement prior to execution in *McElvaine v. Brush*[363] by holding that the eighth amendment did not apply to the states.[364] In *O'Neil v. Vermont*,[365] the Court, relying on *Pervear*,[366] again evaded defining the eighth amendment's scope on the ground that it did not apply to the states. Despite the persistent appearance of this issue, the law on the issue remained relatively unchanged until the rise of the "selective incorporation" doctrine in the 1920's.[367]

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[357] *See* Spector v. United States, 193 F.2d 1002, 1004 (9th Cir. 1952), in which the court of appeals noted that "bail should not be higher than that normally fixed for offenses carrying like penalties, in the absence of showing of special circumstances requiring larger bail," and United States v. Noto, 226 F.2d 953, 954 (2d Cir. 1955) (Clark J., dissenting) in which he observed that "a general pattern does develop in the ordinary case of the impecunious accused, somewhere in the range of $5,000 for serious felonies and $10,000 for major ones. In the normal criminal prosecution, courts pause at sums in excess of this unless the easy financial condition of the defendant suggests an increase." *See, e.g.*, United States v. Averett, 26 F.2d 676 (W.D. Va. 1928), in which four defendants charged with the joint theft of $27,000 from mail pouches were required to give bail in the amount of $5,000 each. A motion to reduce bail was denied. The court pointed out that bail already was insufficient since the aggregate amount was $7,000 less than the sum stolen. The court feared that the defendants might use that sum to indemnify their sureties and then flee. In Hernandez v. Heyd, 307 F. Supp. 826 (E.D. La. 1970), the court set bail at $40,000 for individuals charged with the possession of narcotics because on arrest they had in their posession $21,000, leading to a suspicion that they were commercial dealers. *See also* United States v. Foster, 296 F.2d 249 (4th Cir. 1961) ($200,000 for tax evasion exceeding $300,000); Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964) ($100,000 for murder); Hodgdon v. United States, 365 F.2d 679 (8th Cir.), *cert. denied*, 385 U.S. 1029 (1966) ($50,000 for intimidation of a magistrate and assault upon a deputy marshal).

[358] Stack v. Boyle, 342 U.S. 1, 6 (1951).

[359] 32 U.S. (7 Pet.) 243 (1833).

[360] *Id.* at 247.

[361] 72 U.S. (5 Wall.) 475 (1866).

[362] *Id.* at 479-80.

Although the Court has never accepted the theory that the fourteenth amendment made all of the Bill of Rights applicable to the states,[368] various provisions of the Bill of Rights have been "selectively incorporated" in the due process clause of the fourteenth amendment.[369] Under the modern approach, those federal constitutional rights deemed "fundamental to the American scheme of justice" apply to the states through the fourteenth amendment.[370] The Court has not decided if the "excessive bail" clause of the eighth amendment applies to the states under this current view of incorporation. However, the "cruel and unusual punishment" clause of the amendment has been incorporated in fourteenth amendment due process.[371]

Lower federal courts have ruled that the "excessive bail" clause of the eighth amendment applies to the states. For example, in *United States ex rel. Keating v. Bensinger*,[372] a state court's denial of bail to a state prisoner pending appeal, without a statement of reasons for the denial, was held to be an arbitrary denial of bail. In so holding, the district court decided that the Supreme Court could not have "intended to incorporate only a portion of an amendment into the fourteenth amendment's due process clause" and concluded that "the provision of the eighth amendment prohibiting excessive bail likewise is binding on the states."[373] Numerous other federal courts have

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[363] 142 U.S. 155 (1891).

[364] *Id.* at 158-60.

[365] 144 U.S. 323 (1892).

[366] *Id.* at 332. *See also* Collins v. Johnston, 237 U.S. 502 (1915) (eighth amendment not applicable to states).

[367] The doctrine was first applied, although not explicitly, in Powell v. Alabama, 287 U.S. 45 (1932), wherein the Court interpreted the sixth amendment to require the assignment of counsel to indigent defendants in capital cases in state courts.

[368] 
> Wholesale incorporation of Bill of Rights guarantees into the 14th Amendment continues to be rejected by the Court; but the modern Court's technique of "selective incorporation" has achieved virtually the same result—virtually all of the procedural protections in the first eight Amendments now apply to the states in the same way in which they restrict federal criminal proceedings.

G. GUNTHER, CONSTITUTIONAL LAW 505 (9th ed. 1975).

[369] *See generally* Henken, *Selective Incorporation In the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

[370] Duncan v. Louisiana, 391 U.S. 145, 149 (1968). *See also* Benton v. Maryland, 395 U.S. 784 (1969).

[371] *Compare* Robinson v. California, 370 U.S. 660 (1962) *with In re* Shuttlesworth, 369 U.S. 35 (1962). *See also* Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

[372] 322 F. Supp. 784 (N.D. Ill. 1971).

[373] *Id.* at 786.

Forty-two of the fifty states are guided by provisions similar to the federal bail clause. The concurred with the theory espoused in *Keating*, and in two cases where certiorari was sought it was denied.[374]

Notwithstanding the question of whether the eighth amendment applies to the states by incorporation in the fourteenth amendment due process clause, a denial of bail is not insulated from a fourteenth amendment equal protection challenge where a statutory right to bail does exist.[375] In such a case there exists the possibility of the discriminatory identification of a particular class on the basis of wealth, namely, those who cannot afford bail.

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right to bail under a majority of the state constitutions may be summarized as follows: all persons charged with a crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption is great. *E.g.*, Alaska Const. art. I, § 11; Ala. Const. art. I, § 16; Ark. Const. art. II, § 8; Cal. Const. art. I, § 6; Colo. Const. art. II, § 19; Conn. Const. art. I, § 14; Del. Const. art. I, § 12; Fla. Const. art. I, § 14; Idaho Const. art. I, § 6; Ill. Const. art. I, § 9; Indiana Const. art. I, § 17; Iowa Const. art. I, § 12; Kan. Bill of Rights § 9; Ky. Const. § 16; La. Const. art. I, § 12; Me. Const. art. I, § 10; Mich. Const., art. I, § 15; Minn. Const. art. I, § 7; Miss. Const. art. III, § 29; Mo. Const. art. I, § 20; Mont. Const. art. III, § 19; Neb. Const. art I, § 9; Nev. Const. art. I, § 7; N.H. Rev. Stat. Ann. § 597; N.J. Const. art. I, § 11; N.M. Const. art. II, § 13; N.D. Const. art. I, § 6; Ohio Const. art. I, § 9; Ore. Const. art. I, § 14; R.I. Const. art. I, § 9; S.C. Const. art. I, § 20; S.D. Const. art. VI, § 8; Tenn. Const. art. I, § 15; Utah Const. art. I, § 8; Vt. Const. art. II, § 32; Wash. Const. art I, § 20; Wisc. Const. art. I, § 8; Wyo. Const. art. I, § 14.

In Texas, all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be construed to prevent bail after indictment found upon examination of the evidence in such manner as may be prescribed by law. Tex. Const. art. I, § 11.

In Georgia and New York, there is an absolute right to bail only in misdemeanor cases. Ga. Code Ann. § 13(b) (1951); N.Y. Crim. Proc. Law § 530.20(2) (McKinney 1971).

In several states, the judge has almost complete discretion to allow bail or not, in accord with the common law. Mass. Ann. Laws ch. 276, § 42 (1956); N.C. Gen. Stat. § 15-103.1 (1975); Va. Code § 19.2-120 (1950); W. Va. Code § 62-1C-1(a).

*See also* Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detention*, 55 Va. L. Rev. 1223, 1226 n.17, 1227 n.22, 1228 n.24 (1969).

[374] White v. Wilson, 399 F.2d 596 (9th Cir. 1968); Henderson v. Dutton, 397 F.2d 375 (5th Cir. 1968); Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); Pilkinton v. Circuit Court of Howell County, 324 F.2d 45 (8th Cir. 1963); Hernandez v. Heyd, 307 F. Supp. 826 (E.D. La. 1970); Goodine v. Griffin, 309 F. Supp. 590 (S.D. Ga. 1970); Arsad v. Henry, 317 F. Supp. 129 (E.D.N.C. 1970); Ramey v. Russell, 299 F. Supp. 947 (E.D. Tenn. 1969); United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203 (S.D.N.Y 1969); Peppers v. Daniel, 306 F. Supp. 1225 (E.D. Tenn. 1969); United States *ex rel.* Siegal v. Follette, 290 F. Supp. 632 (S.D.N.Y. 1968); United States *ex rel.* Fink v. Heyd, 287 F. Supp. 716 (E.D. La. 1968), *aff'd*, 408 F.2d 7 (5th Cir.), *cert. denied*, 396 U.S. 895 (1969); Wansley v. Wilkerson, 263 F. Supp. 54 (W.D. Va. 1967).

The federal courts have recognized that states may constitutionally provide that bail be granted in some cases as a matter of right and granted or withheld in other cases, provided that the power is exercised rationally and without discrimination. Botter v. United States, 389 U.S. 15 (1967); Rehman v. California, 85 S. Ct. 8 (Douglas, Circuit Justice, 1964); Fernandez v. United States, 81 S. Ct. 642 (Harlan, Circuit Justice, 1961); Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964); Unted States *ex rel.* Hyde v. McMann, 263 F.2d 940 (2d Cir.), *cert. denied*, 360 U.S. 937 (1959); Wansley v. Wilkerson, 263 F. Supp. 54 (W.D. Va. 1967); Unied States *ex rel.* Fink v. Heyd, 287 F. Supp. 716 (E.D. La. 1968), *aff'd*, 408 F.2d 7 (5th Cir.), *cert. denied*, 396 U.S. 895 (1969).

[375] 18 U.S.C. § 3146 (1970) provides for a defendant's release in non-capital cases prior to trial.

The Supreme Court, in *Griffin v. Illinois*,[376] recognized the right of indigent defendants to a trial transcript, or an adequate substitute, as an incident of the right to full appellate review of criminal convictions. Writing for the majority, Justice Black stated:

> [O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of the entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American Court."[377]

This sweeping language suggested broad implications for the system of bail. Justice Burton, in dissent, attempting to employ *reductio ad absurdum*, identified the expansive scope of the holding with the query, "Why fix bail at any reasonable sum if a poor man can't make it?"[378]

Application of the *Griffin* rule to bail was proposed in *Bandy v. United States*.[379] Noting that the bail system operates on the assumption that the defendant has property, the potential forfeiture of which will effectively deter breach of his release conditions, Justice Douglas concluded that to demand a substantive bond, which the accused is unable to pay, "raises considerable problems for the equal administration of the law." He wondered whether, in light of the *Griffin* holding, "an indigent [could] be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom."[380] However, concluding that Bandy's petition for certiorari did not present a substantial question, Douglas declared that he was constrained to work within existing statutory limitations and denied Bandy relief.[381]

As early as 1891, the Court perceived that those most often before courts to answer criminal charges "belong to the poorest class of people [and], to require them to pay the cost of their recognizance would generally result in their being detained in jail at the expense of government, while their families would be deprived, in many instances, of their support and assistance."[382] Indeed, when Alexis de Tocqueville traveled in the United States, he found a bail system which was "directed against the poor, and favored only the rich."[383] Although the bail system in the United States was adopted from the English model, its application in America presented new problems for the ancient surety-principal relationship. The surroundings were vast and unknown; the people diverse and unrooted. To adopt to this novel environment, a monetary feature was affixed to the bail system. After an accused was determined bailable, a sum of money was demanded of him to assure his future appearance. Those unable to meet the requirement were forced to rely upon that curious by-product of the system, the bail bondsman. Those unable to meet the bondsman's fee, or unable to secure his discretionary support, were remanded.[384]

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[376] 351 U.S. 12 (1956).

[377] *Id.* at 17, *quoting* Chambers v. Florida, 309 U.S. 227, 241 (1940).

[378] 351 U.S. at 29.

[379] 81 S. Ct. 197 (Douglas, Circuit Justice, 1960).

[380] *Id.* at 199.

[381] Bandy v. United States, 82 S. Ct. 11, 13 (Douglas, Circuit Justice, 1961).

[382] United States v. Barber, 140 U.S. 164, 167 (1891).

[383] ALEXIS DE TOCQUEVILLE, DEMOCRATIE EN AMERIQUE 45 (1835) (translation supplied).

The effect of this monetary feature is that presumably innocent defendants, subjected to detention, are unable to aid in the preparation of their defense, unable to search for witnesses, unable to maintain constant contact with their attorneys,[385] unable to provide for their families, and, in fact, may lose their jobs, as well as their self-respect, even if acquitted.[386] Because of their indigence alone, these individuals are denied their freedom and made victims of imprisonment's adverse consequences, both legal and extra-legal. Still, an equal protection challenge based on the denial of release to those unable to afford bail may not be sustainable.

A threshold question for equal protection analysis is which standard of review is appropriate for a bail statute that has the effect of discriminating on the basis of wealth. At least three separate standards presently exist: the "old" equal protection standard, or rational basis test, the "new" standard, or strict scrutiny test, and the "newer" standard, or sliding scale test.[387] This section explores potential equal protection challenges to bail in terms of all three tests.

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[384] Judge J. Skelly Wright, in his concurring opinion in Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963), wrote, "[t]he effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety. . . .The Court . . . [is] relegated to the relatively unimportant chore of fixing the amount of bail."

There is evidence which may suggest that the professional bail bondsman dates from the fourteenth century. Putram, Yorkshire Sessions of the Peace 1361-64, at xxviii (Yorkshire Archaeological Society 1939), observed that the recurrence of the same names on the bail rolls suggests the existence of professional bail.

[385] *See* United States *ex rel* Hyde v. McMann, 263 F.2d 940 (2d Cir.), *cert. denied*, 306 U.S. 937 (1959). There, the court was confronted with the issue of whether a state so improperly interfered with the petitioner's preparation of a defense by confining him to a prison because of his inability to meet bail as to deprive him of a "fair" trial. The claim of the petitioner principally rested upon an allegation that his imprisonment for more than three months prior to his trial, and the subsequent refusal of the trial court to delay his trial for more than a day, prevented him from locating a prostitute, known to him only as "JoAnn," with whom he claimed to have spent the night when the crimes for which he was convicted were committed. The court found no basis for the claim that the conviction was "tainted with such unfairness as to amount to a denial of due process."

[386] *See, e.g.*, R. Goldfarb, Ransom: A Critique of the American Bail System (1965); Ares, Rankin, and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 67 (1963); Ervin, *The Legislative Role in Bail Reform*, 35 Geo. Wash. L. Rev. 429 (1967); Foote, *The Coming Constitutional Crisis in Bail (Pt. II)*, 113 U. Pa. L. Rev. 1125 (1965); Rankin, *The Effect of Pre-Trial Detention*, 39 N.Y.U. L. Rev. 641 (1964); Note, *Bail in the United States—A System in Need of Reform*, 20 Hastings L.J. 380 (1968); Note, *Bail: An Ancient Practice Re-examined*, 70 Yale L.J. 966 (1961); Note, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958); Advisory Committee on Pre-Trial Proceedings, Pre-Trial Release (New York: American Bar Association, 1968).

*See also* Joint Report Of The Subcommittee On The Constitutional Rights And The Subcommittee On Improvement In Judicial Machinery, *Constitutional Rights and Federal Bail Procedure*, (1965); Report Of the United States Attorney General's Committee On Poverty And The Administration Of Criminal Justice (1963). *See generally* Comment, *The Institution of Bail as Related to Indigent Defendants*, 21 La. L. Rev. 627 (1960); Note, *Criminal Procedure —Some Problems in the Administration of Bail*, 44 Ky. L.J. 447 (1956); and especially W. Thomas, Bail Reform in America (Los Angeles ed. 1976).

The "old" equal protection, based upon a strong presumption of legislative validity,[388] invokes a minimal scrutiny requiring only a "rational basis" for the challenged government action,[389] which will not be invalidated "if any state of facts reasonably may be conceived to justify it."[390] Even though this approach is denominated "old" equal protection, it presently is applied, especially in certain cases involving economic and social legislation.[391] As these cases indicate, invoking the rational basis test is virtually certain to result in victory for the government.[392] Bail statutes, as they currently exist, undoubtedly would survive an equal protection challenge under the rational basis test since it hardly can be said that the money classifications created by these statutes are without rational relationship to the legislative objective of securing the presence of the accused upon trial.

The emergence of the "new" equal protection during the last decade of the Warren Court brought with it the second-tier "strict scrutiny" standard reserved for those cases involving "suspect classifications"[393] or "fundamental rights"[394] (or "constitutionally protected interests").[395] Under this standard, the challenged government action can be upheld only if justified by a compelling interest.[396] Even if the government is able to demonstrate this level of concern, it must show additionally that it has selected the least drastic means of effectuating its policy.[397] Once the strict scrutiny standard is invoked the demise of the challenged action is virtually assured.[378]

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[387] *See generally* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

[388] McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

[389] *Id.* at 425. *See also* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

[390] McGowan v. Maryland, 366 U.S. at 426.

[391] *E.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976); Washington v. Davis, 426 U.S. 229 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

[392] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

[393] Various classifications have been categorized as "suspect", including alienage, Nyquist v. Mauclet, 97 S. Ct. 2120 (1977); Graham v. Richardson, 403 U.S. 365, 372 (1971); race, Loving v. Virginia, 388 U.S. 1, 9 (1967); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); and nationality, Oyama v. California, 332 U.S. 633, 646 (1947), *quoting* Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[394] Among these are the right to vote, right to associate freely and right to move freely among the states. Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Harper v. Board of Elections, 383 U.S. 663, 667 (1964); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

[395] As demonstrated by the cases cited in note 394 *supra*, the right need not be one explicitly mentioned in the Constitution.

[396] Schlesinger v. Ballard, 419 U.S. 498 (1975) (Brennan, J., dissenting). *See also* Gunther, *supra* note 387, at 10.

[397] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); *In re* Griffiths, 413 U.S. 715 (1973); Graham v. Richardson, 403 U.S. 365, 375-76 (1971).

The strict scrutiny standard arguably is inapplicable to an equal protection challenge against bail for two reasons. First, bail is not among those rights that has been characterized by the Supreme Court as "fundamental."[379] Second, following this approach, if an attack on statutory bail as discriminating on the basis of wealth[380] is to be sustained under the strict scrutiny standard, the "wealth" classification must be "suspect." However, while the Court has suggested in dicta that wealth classifications are suspect, no case actually has invalidated a law solely because of its differential impact on the poor.[381]

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[378] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976).

[379] More importantly, as this article consistently argues, there is *no* constitutional right to bail. Nor can such a right be created through the equal protection clause. "Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the equal protection clause, rather, is simply to measure the validity of *classifications* created by state laws." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring).

[380] It might be suggested that the argument that bail discriminates on the basis of wealth was bolstered by the Supreme Court's decision in Tate v. Short, 401 U.S. 395 (1971). There, an indigent had accumulated fines totaling $425 on nine traffic infractions. Although Texas law provided only for fines for such offenses, a municipal ordinance required that those unable to pay be incarcerated to satisfy their fines at a rate of five dollars per day. After twenty-one days, the petitioner was released on bond. An action was then initiated challenging the constitutionality of the ordinance. The Court found the ordinance repugnant to the Constitution because "the Equal Protection Clause . . . required that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Id.* at 398-99. The Court emphasized, however, that its holding *did not* suggest any constitutional barrier to imprisonment in cases of alternative sentencing, *e.g.*, "thirty days or thirty dollars," a situation more analogous to the pattern in bail cases.

Shortly after the *Tate* decision, the Court was requested to scrutinize the bail system of Illinois. Schieb v. Kuebel, 404 U.S. 357 (1971). The system was regulated by a statute enacted in 1963 which provided three alternative methods of release: (1) personal recognizance; (2) a deposit of ten percent of the bail bond with the court clerk, to be returned, less ten percent retained for costs; (3) a deposit of the full amount of the bail bond, all of which would be returned upon satisfaction of the conditions of the bond. The appellant had been arrested and charged with leaving the scene of an automobile accident and with obstructing traffic. To gain pre-trial liberty, he deposited ten percent of a $750 bail requirement ($500 on the first charge and $250 on the second charge). The accused was subsequently acquitted of leaving the scene of an accident, but convicted of the obstruction charge. When the fine for the latter offense was paid, the bail deposit was returned, minus $7.50 retained as "bail bond costs." The appellant challenged the statute, claiming that it contravened the equal protection and due process clauses of the fourteenth amendment because it imposed bail costs on the poor and innocent. The Court rejected the contention, and, quoting from Rinaldi v. Yeager, 384 U.S. 305 (1966), noted, "[t]he Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." 404 U.S. at 368.

[381] San Antonio Independent School Dist. v. Rodiguez, 411 U.S. at 36-37.

San Antonio involved an unsuccessful equal protection challenge to a school financing method based in substantial part on the imposition of property taxes by local school districts. It was alleged that under this financing method disparities in per-pupil educational expenditures resulted from differences among school districts with respect to the amount of property per pupil available for taxation. In declining to characterize the wealth classification involved as "suspect" for purposes of equal protection analysis, the Court concluded there was no evidence of any complete deprivation of rights since it had not been shown that the education provided by the school district was inadequate in an absolute sense. *Id.* at 24. In the case of bail, however, denial

Assuming that an equal protection challenge to bail could not succeed under "old" or "new" equal protection, there is still the possibility of invalidating the challenged classification under the "newer" equal protection, or sliding scale theory[482]—an intermediate level of analysis compared to the strict scrutiny and rational basis tests. Applying this intermediate methodology to determine whether a law violates equal protection, the Court essentially balances the "facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classifications."[483] The Court examines a spectrum of interests, concentrating on the character of the classification in question, the competing interests involved, and the constitutional importance of any asserted rights.

In analyzing the character of the money classification in a challenged bail statute, it is useful to refer to the following guidelines that have been employed in other cases. First, the government purpose underlying the challenged legislation must be clearly articulated by the government; the Court will not strain "to hypothesize independently on the desirability or feasibility of any possible alternative basis"[484] for the classification as the Court does under the rational basis test. In the case of bail this articulated purpose clearly exists, *viz.*, assuring the presence of the accused upon the trial.[485] Second, there must be a careful examination of the extent to which the governmental purpose is served by the means employed.[486] The Court must be satisfied that the articulated purpose is not so "inconsistent or insubstantial as not to be reasonably supportive of its conclusions."[487] The federal bail statute enumerates certain conditions that, if met, allow release without monetary bail. This fact mitigates any potential argument that monetary bail, where required under the federal statute, is not an essential means to assure the presence of the accused at trial.

In respect of a sliding scale analysis of the competing interests involved, many of the considerations are readily apparent. Stated simply, the conflict is between the interest of the presumably innocent, albeit indigent, defendant in being free of the debilitating consequences of imprisonment pending trial and the articulated interest of the state in assuring the defendant's presence at the trial.

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of release to those unable to afford bail may represent a complete deprivation. This argument conceivably could affect the outcome of analysis as to whether "wealth" is a suspect class in respect of the administration of bail.

[482] *See* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Reed v. Reed, 404 U.S. 71 (1971).

[483] Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[484] Mathews v. Lucas, 427 U.S. 495, 515 (1976).

[485] 18 U.S.C. § 3146(a) (1970). *See also* United States v. Erwing, 268 F. Supp. 879 (N.D. Cal. 1967).

[486] *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 449-52 (1972); Reed v. Reed, 404 U.S. 71 (1971).

[487] Mathews v. Lucas, 427 U.S. 495, 516 (1976).

The considerations pertaining to the respective importance of these competing interests, however, are not so apparent. For example, in *Butler v. Crumlish,*[408] Judge Freedman held that "The constitutional authority for the State to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself."[409] The district judge thus held that the requirement that an accused, detained for want of fulfilling the conditions of bail, be forced to participate in a "line-up" amounted to "an invidious discrimination" between those who are released on bail and those who are not. However, the following year, with Freedman in dissent, the Third Circuit rejected the argument that forced participation in a "line-up" for those held because of an inability to post bail constituted "invidious discrimination" based on wealth.[410]

The Third Circuit's reasoning was followed by the district court in *United States ex rel Priest v. Department of Corrections.*[411] Priest was convicted of robbery on evidence gathered from him by police during an interrogation while he was detained on an unrelated case because of his inability to meet bail. The attorney for Priest argued in a habeas corpus proceeding that another person similarly charged with the same offense, but who could post bail, would have avoided police interrogation. Priest was therefore being denied the equal protection of the laws. The court rejected the argument by narrowing the applicant's reference group. It acknowledged that a denial of equal protection resulted if another person in a similar class were afforded different treatment; however, it held that Priest's immediate reference group constituted those held in lieu of bail, rather than those arrested for a crime.[412]

At the present time, however, this discussion of "newer" equal protection may be of questionable value as the Supreme Court has not made clear whether it will adopt the middle level of analysis and de-emphasize the strict scrutiny-rational basis dichotomy as the principal means of adjudicating equal protection claims.[413]

Although Congress in 1966 responded to the persistent call for bail reform, the Bail Reform Act of 1966 still permits the imposition of a financial requirement if the more desirable conditions of release will not assure appearance.[414] Thus, a distinction continues to exist between those released and those detained because they are unable to satisfy the conditions of release,"[415] and the constitutionality of this distinction remains largely undetermined regardless of what equal protection test is applied.

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[408] 229 F. Supp. 565 (E.D. Pa. 1964).

[409] *Id.* at 567.

[410] Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965).

[411] 268 F. Supp. 242 (D. Del. 1967).

[412] The preceding year, a court refused to hold "that the setting of high bail prejudiced [the defendant] . . ." even though it acknowledged that bail "may have been excessive. . . ." United States v. Oliver, 363 F.2d 15, 18 (7th Cir. 1966).

[413] Massachusettes Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting).

[414] 18 U.S.C. § 3146(a) (1970). Senators McClellan and Kennedy have recently introduced S. 1437, 95 Cong., 1st Sess., §§ 3501-11 (1977) (bill to codify, revise, and reform title 18 of the U.S.C., and for other purposes) which would continue the provisions of the Bail Reform Act of 1966.

## IV. RELEASE IN NON-CAPITAL OFFENSES PENDING TRIAL[416]

In his *Essay On Crime and Punishment*, the Marquis de Beccaria observed that "Imprisonment is a punishment, which differs from all [other forms of punishment] in . . . that it necessarily precedes conviction."[417] Effective punishment demands swift imprisonment. However, a fair trial requires a certain distance between arrest and court proceedings. The resulting interval creates a dilemma for the criminal justice system. If the individual accused of a crime absconds, society's rights have been abused. On the other hand, society also has established the dual principle that only the guilty should suffer punishment and that a man is to be presumed innocent until proven guilty. To reconcile these conflicting forces which are generated in the pretrial period, the notion of bail is employed.[418]

The common law did not provide for an absolute right to bail.[419] The framers of the United States Constitution did not see fit to guarantee a right to bail.[420] However, the majority of the representatives of the American people at least have, from the first American Congress, found it desirable to establish a right to bail in non-capital cases pending trial.[421] From the Judiciary Act of 1789, federal law has required that individuals accused of a non-capital offense be admitted to bail.[422]

Rule 46 of the Federal Rules of Criminal Procedure simply continued the rule of section 33 of the Judiciary Act of 1789. Although rule 46 was amended in 1956 and 1966, subsection (a)(1) remained unchanged. Rule 46 did, however, provide for the consideration of additional criteria by the judicial officer setting the amount of bail necessary for reasonably assuring the appearance at trial. Prior to the formulation of rule 46, judges were guided by case law which established two criteria for the setting of bail: (1) the gravity of the offense and (2) the financial ability of the defendant.[423] To these, the Federal Rules of Criminal Procedure of 1946 appended: (3) the weight of the evidence against the defendant and (4) the character of the defendant.

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[415] Of course, the opportunity for bail may not be administered arbitrarily. Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964). *See also* Collins v. Jozwiak, 315 F. Supp. 188 (E.D. Wis. 1970).

[416] The law in this section applies equally to cases of bail pending retrial, since motions for bail at this stage are considered the same as those for bail prior to trial, for the presumption of innocence is renewed upon the granting of a mistrial.

[417] MARQUIS DE BECCARIA, ESSAY ON CRIME AND PUNISHMENT 88 (Dublin ed. 1767).

[418] *See* Quassem, *Bail and Personal Liberty*, 30 CAN. B. REV. 378 (1952).

[419] *See generally* notes 252-94 and accompanying text *supra*. *See also* United States v. Delaney, 8 F. Supp. 224 (D.N.J. 1934).

[420] *See generally* notes 295-314 and accompanying text *supra*.

[421] From the enactment of the Judiciary Act of 1789, the pattern in the United States has been to reduce the amount of discretion in the judiciary. The opposite trend is observable in England. There, judges and magistrates have been empowered with increasing discretion. *See, e.g.*, 7 Geo. 4, c. 64, § 1 (1826); 11 & 12 Vict., c. 42, § 23 (1848); the Criminal Justice Act of 1967, c. 80, § 18. *See also* Regina v. Gentry, 39 Crim. App. 195 (1955), in which the Criminal Court of Appeals warned, "it is most dangerous to grant bail to a man with a long record of conviction, unless the magistrates think that there is a real doubt as to his guilt, because he is sure, if he is admitted to bail, to commit offenses while he is on bail."

[422] *See* text accompanying note 310 *supra*. *See also* Act of March 2, 1793, ch. 22, § 4; Rev. Stat., tit. XIII, § 1015 (1873-1874).

In setting the amount of bail, no one of the criteria is determinative by itself; rather, the amount is established by the composite. With respect to the "nature and circumstances of the offense," the courts, very early, expressed strong reluctance to release on bail in cases of treason.[424] In 1790, high treason had been deemed a capital offense.[425]

Five years thereafter, however, the Supreme Court allowed bail for a defendant charged with high treason.[426] An affidavit introduced showed that although he had attended several meetings of the "whiskey rebellion" insurgents, his deportment on those occasions was calculated to restore order and submission to law. Also placed in evidence was an affidavit endorsed by several of the most respectable inhabitants of the western counties, which attested to the propriety of the prisoner's conduct throughout the insurrection. In 1813 bail was granted to an individual indicted for piracy.[427] Justice Washington, as circuit justice, noting the poor health of the accused, stated, "The humanity of our laws, not less than the feeling of the court, favour the liberation of a prisoner upon bail, under such circumstances."[428] In 1861, the courts were given power to impose imprisonment and fines instead of death for treason,[429] and the offense was affixed to the existing enumeration of bailable offenses requiring the opportunity of release before trial.[430] Nevertheless, the charge of treason is still influential in aggravating the severity of the conditions of release.[431]

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[423] *See* text accompanying note 349 *supra*.

[424] In 1795, the Supreme Court stated that, "the circumstances must be very strong, which will, at any time, induce us to admit a person to bail, who stands charged with high treason." United States v. Stewart, 2 U.S. (2 Dall.) 343, 345 (1795).

[425] Act of April 30, 1790, ch. 9, § 1.

[426] United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

[427] United States v. Jones, 26 F. Cas. 658 (C.C. Wash. 1813) (No. 15,495).

[428] *Id.* at 659.

[429] Ch. 33, 12 Stat. 284 (1861).

[430] *See* United States v. Schneiderman, 102 F. Supp. 52 (S.D. Cal. 1951). *See also* Case of Davis, 7 F. Cas. 63 (C.C.D. Va. 1867-71) (No. 3,621a).

[431] United States v. Schneiderman, 102 F. Supp. 52 (S.D. Cal. 1951). *But see Ex parte* Monti, 79 F. Supp. 651 (E.D.N.Y. 1948), in which the defendant was charged with treason for adhering to the government of the German Third Reich from October 13, 1944 to May 8, 1945. Even though the defendant had been held for five months without bail pending trial, his request for release on bail was denied. The court took note of the government's contention that extensive preparation, which should be completed in one month's time, was necessary. The court warned, however, that "there must come a time when very long incarceration on a mere complaint, deprives a prisoner of a constitutional right." *Id.* at 654. *See also* United States v. Egorov, 319 F.2d 817, (2d Cir.), *cert. denied*, 375 U.S. 926 (1963).

Contempt is also an action which courts are renitent to bail.[432] In *Lee's Case*,[433] a federal court held that a person committed for contempt is not entitled to judicial liberation upon bail.[434] The case involved a person accused of a series of crimes, under two distinct headings: forgery of enlistment papers and procuring or attempting to procure desertion. The defendant was liberated upon a regular recognizance of bail. Under the first heading, three bills of indictment were handed up. Lee was tried under one of these indictments, and convicted. However, before the jury announced their verdict, Lee fled. He was rearrested, sentenced to pay a fine and undergo a certain imprisonment. However, President Johnson granted Lee a pardon, conditioned on payment of the fine. Lee complied with the condition, and was discharged from the penitentiary.

The pardon referred only to the conviction, and made no mention of the untried indictments. The United States Attorney, exploiting the circumscribed purview of the pardon, succeeded in a move to recommit the defendant. On July 12, a motion was filed on Lee's behalf for leave to enter bail. Counsel for Lee averred that a renewal of bail was demandable of right. Ruling on the motion, the court related that for contempt by abusing the privilege of liberation upon bail such parties must occasionally be committed without bail. The court noted that, even when the contempt has been punished or purged, detention without opportunity for bail may be necessary in order to secure the defendant's presence at a future trial.[435] The court further stated that if a new privilege of bail arose from the delay of trial, the amount of bail, and the number of sureties required, would be adversely affected by an earlier forfeiture. Reluctantly, the court in its discretion allowed bail in the amount of $10,000, and directed that three sureties, each in $5,000, be taken.

In 1920, the Court of Appeals for the Seventh Circuit granted bail to a defendant, as a matter of right, even though he had been twice arrested after absconding.[436] The court held that if an individual were indicted for absconding and forfeiting bail, he would be absolutely entitled to be admitted to bail unless the punishment for such absconding were death.[437] However, four years later, a district court held that bail is not absolute, and is subject to forfeiture. It observed that while one who has absconded is not barred from being admitted to bail on another and different accusation, public policy warns against admission to bail in the same case.[438]

The more cautious position may be somewhere between the above two cases. Indeed, bail is not absolute, and can be denied completely *if* it is evident that no matter what the conditions of release are, the defendant will not appear.[439] However, the emphasis must be placed on the fact that the appropriate remedy is to attempt to discover terms which will sufficiently deter absconding. Only when the judge conceives that "regardless of the amount set the accused will be unlikely to be present at trial" could bail pending trial be denied.[440] "Admission to bail always involves a risk that the accused will take flight,"[441] but the risk is a calculated one.[442]

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[432] *But see In re* Lewis, 418 U.S. 1301 (1974).

[433] Lee's Case, 15 F. Cas. 136 (C.C.E.D. Pa. 1865) (No. 8,180).

[434] *Id.* at 137; *see also* Wright v. Henkel, 190 U.S. 40 (1903).

[435] 15 F. Cas. at 139.

[436] Rowan v. Randolph, 268 F. 527 (7th Cir. 1920).

[437] *Id.* at 528.

[438] *In re* Lamar, 294 F. 688 (3d Cir. 1924).

The second criterion for determining the amount of bail, listed in rule 46, was the financial ability of the defendant to give bail. Since this criterion was discussed in the section on "The Meaning and Operation of the Eighth Amendment,"[443] it will suffice here to emphasize that financial ability is a factor which cannot be ignored, nor is it the sole measure of the needed conditions of release.[444]

In setting the amount of bail, the court was also required to give due weight to the evidence against the accused;[445] the theory being that those more likely to be convicted have a greater incentive to abscond.[446] In 1813, Justice Washington held that the finding of indictment eliminates the need to inquire into the evidence, since the indicted defendant is probably guilty.[447] However, the

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[439] Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); Corbett v. Patterson, 272 F. Supp. 602 (D. Colo. 1967); Dameron v. Harson, 255 F. Supp. 533 (W.D. La.), *aff'd*, 364 F.2d 991 (5th Cir. 1966).

[440] United States v. Nebbia, 357 F.2d 303, 304 (2d Cir. 1966); United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203, 206-07 (S.D.N.Y. 1969).

[441] Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

[442] *See* 18 U.S.C. § 3146 (1970). Although the risk is calculated, the amount of bail cannot be established at an excessively high amount. *See generally* notes 346-58 and accompanying text *supra*. In United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002, 1004 (2d Cir. 1966), the government sought to have a $20,000 bail requirement increased to $1,000,000 on an individual indicted on five counts of violating the Selective Service Training and Service Act of 1940, by knowingly making false statements to his local draft board regarding his non-liability for service under the Act. The motion to increase was based on information indicating a purpose to flee. The information was to the effect that the petitioner had made several journeys outside the district without notifying the District Attorney's office as required, and that he had been converting large security holdings into cash and government bonds and transferring large sums to his credit in foreign countries. The government's motion to increase was granted; bail was set at $500,000. Petitioner, however, secured a short stay order and attempted, unsuccessfully, to have bail reduced to the original amount before a third judge. Next, petitioner moved on a writ of habeas corpus to test the validity of his incarceration. At this hearing, bail was decreased to $20,000. The court saw the ties that bound the petitioner to his home "not unusually slight." Further, it observed that the "ability to flee . . . does not necessarily indicate a purpose to flee and he is entitled to the opportunity to secure his release pending trial on bail which is not excessive regardless of whether or not he can furnish the half-million dollars. . . ."

[443] *See generally* notes 346-58 and accompanying text *supra*.

[444] *See* note 348 *supra*. *See also* Pilkinton v. Circuit Court of Howell County, 324 F.2d 45 (8th Cir. 1963); United States v. Radford, 361 F.2d 777 (4th Cir.), *cert. denied*, 385 U.S. 877 (1966).

[445] *Ex parte* Monti, 79 F. Supp. 651 (E.D.N.Y. 1948).

[446] *See* United States v. Radford, 361 F.2d 777 (4th Cir.), *cert. denied*, 385 U.S. 877 (1966).

[447] United States v. Jones, 26 F. Cas. 658 (C.C.D. Pa. 1813) (No. 15,495). This view was adopted in 1928 by a Virginia district court which held that the finding of indictment "makes it necessary . . . [to assume] that the defendants are probably guilty." United States v. Averett, 26 F.2d 676 (W.D. Va. 1928). *See also* United States v. Schneiderman, 102 F. Supp. 52 (S.D. Cal. 1951).

Court in *Stack v. Boyle*[448] held that: "To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act."[449]

Finally, the character of a defendant is also a significant factor in the court's establishment of bail.[450] An absence of information concerning the defendant's history, although caused by the defendant's exercise of his fifth amendment privilege, must not prejudice the ultimate bail requirement.[451]

In 1966, rule 46(c) was amended.[452] The heading of the subdivision "Amount" was superseded by the word "Terms." Further, a fifth criterion was appended to the four existing standards for setting bail: "the policy against unnecessary detention of defendants pending trial." The changes were designed to encourage judges to set conditions of release which would avoid superfluous incarceration. In addition, subdivision (d) of the rule was amended to read:

> A person required or permitted to give bail shall execute a bond for his appearance. The commissioner or court or judge or justice, having regard to the conditions set forth in subdivision (c), may require one or more sureties, may authorize the acceptance of cash or bonds or notes of the United States in an amount equal to or less than the face amounts of the bond, or may authorize the release of the defendant without security upon his written agreement to appear at a specific time and place and upon such conditions as may be prescribed to insure his appearance. . . .[453]

The legislative objective of these amendments was to make possible and encourage the release on bail of a greater percentage of indigent defendants.

In conjunction with the amendment to rule 46, the Bail Reform Act of 1966 was passed.[454] The Act continued the tradition of mandatory release pending trial in non-capital cases. The mechanism of release was organized into a hierarchy of severity. The Act creates a strong policy in favor of the minimum conditions of release, *i.e.*, release on personal recognizance or release upon execution of an uninsured appearance bond;[455] and it is only if such minimum alternatives will not reasonably assure the appearance of the defendant that the other alternatives may be imposed.[456] When and if the judge has determined that reasonable assurance of appearance is wanting under the priority conditions, he may impose the first of the following conditions, or, if no single condition gives assurance, any combination of the following conditions:[457]

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[448] 342 U.S. 1 (1951).

[449] *Id.* at 6.

[450] Warren v. Richardson, 333 F.2d 781 (9th Cir. 1964). *Compare Warren with* United States v. Schneiderman, 102 F. Supp. 52 (S.D. Cal. 1951).

[451] Noto v. United States, 76 S. Ct. 255 (Harlan, Circuit Justice, 1955).

[452] *See* Ervin, *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429 (1967).

[453] Based on 6 U.S.C. § 15 (1947).

[454] The Act was in response to a persistent call for bail reform. *See* Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (codified at 18 U.S.C. § 3146 (1970)). From 1958, the Senate Subcommittee on Constitutional Rights was engaged in an investigation into the problems and needed solutions in the field of bail reform. In 1964, three bills were introduced (S. 2838; 2839; 2940). Similar bills were introduced the following year (S. 646; 647; 648). Later in 1965, S. 1357, which expanded S. 646, 647, and 648 was introduced. On the House of Representative's bills, see H.R. 3576-8; 5923; 6271; 6934; 10195 (1965).

The purpose of the act was to

> revise existing bail procedures in the courts of the United States . . . in order to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

[1966] U.S. CODE CONG. & AD. NEWS 2295. *See also* United States v. Erwing, 268 F. Supp. 879 (N.D. Cal. 1967). Introducing the Act, Senator Ervin stated: "[f]ederal bail practices are repugnant to the spirit of the Constitution and dilute the basic tenets that a person is presumed innocent until proven guilty by a court of law, and that justice should be equal and accessible to all. . . ." 111 CONG. REC. 4100 (1965).

> 1. place the person in the custody of a designated person or organization agreeing to supervise him;[458]
> 2. place restrictions on the travel, association, or place of abode of the person during the period of release;[459]
> 3. require the execution of an appearance bond in a specific amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;[460]
> 4. require the execution of a bail bond with sufficient solvent sureties, or deposit of cash in lieu thereof;[461] or
> 5. impose any other condition deemed reasonably necessary to assure appear-

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Criticism had actually been mounting for over a century. In 1853, Francis Lieber in his book, ON CIVIL LIBERTY AND SELF-GOVERNMENT 68 (3d ed. 1874), observed: "[i]t has been objected to [that] . . . bail . . . works unjustly. It temporarily deals with so precious a thing as personal liberty according to possession of wealth. . . ." *See also* Pannell v. United States, 320 F.2d 698 (D.C. Cir. 1963); J. Wright's article in THE REPUBLIC:

> Theoretically a defendant out on bond is in the custody of his bondsman. Thus the bondsman is allowed to charge a modest fee, ten percent of the bond, for the service he renders and the risk he runs. Actually a defendant on bond is in the custody of no one and the police and the F.B.I. are much more familiar with his whereabouts than his bondsman. Moreover, if the defendant fails to appear for trial, it is the F.B.I. or the police who pick him up. . . . In short, the bondsmen get paid for rendering no real service.

J. Skelly Wright, *Criminal Law and the Bill of Rights*, THE REPUBLIC, June 3, 1965, at 23. *See generally* W. THOMAS, BAIL REFORM IN AMERICA (Los Angeles ed. 1976).

[455] 18 U.S.C. § 3146(a) (1970).

[456] Wood v. United States, 391 F.2d 981 (D.C. Cir. 1968); United States v. Gillin, 345 F. Supp. 1145 (S.D. Tex. 1972).

[457] 18 U.S.C. § 3146(a)(1)-(5) (1970).

[458] *See, e.g.*, United States v. Alston, 420 F.2d 176 (D.C. Cir. 1969); United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969).

[459] *See, e.g.*, United States v. Honeyman, 470 F.2d 473 (9th Cir. 1972); United States v. Alston, 420 F.2d 176 (D.C. Cir. 1969); Ball v. United States, 402 F.2d 206 (D.C. Cir. 1968); Brown v. United States, 392 F.2d 189 (5th Cir. 1968); Brown v. Fogel, 387 F.2d 692 (4th Cir.), *cert. denied*, 390 U.S. 1045 (1967); United States v. Melville, 366 F. Supp. 124 (S.D.N.Y. 1969).

[460] *See, e.g.*, United States v. Honeyman, 470 F.2d 473 (9th Cir. 1972); United States v. Alston, 420 F.2d 176 (D.C. Cir. 1969); Ball v. United States, 402 F.2d 206 (D.C. Cir. 1968); Brown v. United States, 392 F.2d 189 (5th Cir. 1968); United States v. Schrieber, 367 F. Supp. 791 (E.D.N.Y. 1973).

[461] *See, e.g.*, Allen v. United States, 386 F.2d 634 (D.C. Cir. 1967); United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969); United States v. Payne, 292 F. Supp. 1012 (D. Conn. 1968); United States v. Ewing, 268 F. Supp. 879 (N.D. Cal. 1967).

ance as required, including a condition requiring that the person return to custody after specified hours.[462]

The assignment of conditions must be for the sole purpose of *reasonably* assuring the presence of the defendant at trial;[463] absolute certainty is not necessary.[464] In view of the clear legislative intent of the Bail Reform Act, a money bail should be imposed as a last resort.[465] Particularly in cases of indigent defendants, the courts are required to avail themselves of the flexibility of the Bail Reform Act.[466]

The necessity of affirmative consideration, by the judge imposing bail, of the various alternative conditions of release was pointed out in *Government of the Virgin Islands v. Bolones.*[467] There the court of appeals held that bail might be allowed in the case of a defendant charged with first degree murder, a non-capital offense in the Virgin Islands. Although the district court judge stated that his denial of bail was founded upon the assumption that the Bail Reform Act did apply, the higher court held that the evidence was insufficient to indicate that the district court had made a deliberate consideration of the possible conditions of release listed in subsection (a) of Title 18 of the U.S. Code, section 3146. Accordingly, the case was remanded for further hearings on the matter of bail. Assuming that release on bail could be denied in a non-capital case, it would have to be shown that there exists no combination of workable conditions that could reasonably assure the appearance of the accused at trial.[468]

In determining which condition or conditions of release to impose, in addition to the criteria set forth in former rule 46,[469] the following factors should be taken into consideration:[470] family ties;[471] employment status;[472] mental condition;[473] length of residence in the community;[474] ability to escape;[475] record of convictions;[476] record of appearance at court proceedings or flight to avoid prosecution.[477] It is significant to note that potential danger to the community or propensity to commit additional crimes while on bail are not factors of consideration during the pre-trial period.[478]

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[462] *See, e.g.*, Ball v. United States, 402 F.2d 206 (D.C. Cir. 1968).

[463] United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969).

[464] United States v. Alston, 420 F.2d 176, 178 (D.C. Cir. 1969).

[465] United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970); United States v. Gillin, 345 F. Supp. 1145, 1147 (S.D. Tex. 1972).

[466] McCoy v. United States, 357 F.2d 272, 273 (D.C. Cir. 1966). *See also* United States v. Cowper, 349 F. Supp. 560, 563 (N.D. Ohio 1972).

[467] 427 F.2d 1135 (3d Cir. 1970).

[468] United States v. Melville, 306 F. Supp. 124, 128 (S.D.N.Y. 1969). *See also* United States v. Honeyman, 470 F.2d 473, 474 (9th Cir. 1972).

[469] In 1972, rule 46 was amended so as to establish 18 U.S.C., section 3146 as the explicit regulator of conditions, as well as factors in the consideration of the conditions of release.

[470] 18 U.S.C. § 3146(b) (1970).

[471] *See, e.g.*, United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970) (there the court took note of the fact that the defendant was a married man living with his family). In United States v. Bronson, 433 F.2d 537, 540 (D.C. Cir. 1970), the court noted that the lack of family and community ties is not an insurmountable obstacle to pre-trial release but may be overcome by the imposition of carefully chosen conditions. *See also* Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969); United States v. Figueroa, 347 F. Supp. 112 (D. Mass. 1972); United States v. Cowper, 349 F. Supp. 560, 564 (N.D. Ohio 1972).

[472] *See, e.g.*, United States v. Wright, 483 F.2d 1068 (4th Cir. 1973); United States v. Alston, 420 F.2d 176 (D.C. Cir. 1969); Allen v. United States, 386 F.2d 634 (D.C. Cir. 1967); United States v. Cowper, 349 F. Supp. 560 (N.D. Ohio 1972); United States v. VanCaester, 319 F. Supp. 1297 (S.D. Fla. 1970); United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969); United States

Note

If the judicial officer sets conditions of release which the defendant is unable to meet, the Bail Reform Act has provided for a chain of review. The first reexamination for defendants so situated takes place only twenty-four hours subsequent to the initial release hearing. The appeal is heard by the judicial officer who was responsible for the establishment of the unattainable conditions, or by another judicial officer in the same district if the judicial officer who conducted the initial hearing is unavailable.[479] If detainment endures beyond the first review a second appeal is available to an appellate court in the case of continued detention subsequent to review by the judicial officer responsible for fixing the original conditions,[480] or to the court of original jurisdiction in the instance of continued detention after review by a judicial officer other than the original judge.[481] In addition, since July 1, 1966, rule 46 has provided that for defendants who continue in confinement in lieu of

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v. Payne, 292 F. Supp. 1012 (D. Conn. 1968).

[473] *See, e.g.*, Allen v. United States, 386 F.2d 634, 635 (D.C. Cir. 1967).

[474] *See, e.g.*, United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970); Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969); Ball v. United States, 402 F.2d 206 (D.C. Cir. 1968); United States v. Gillin, 345 F. Supp. 1145, 1148 (S.D. Tex. 1972); United States v. VanCalster, 319 F. Supp. 1297 (S.D.N.Y. 1970); United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969); United States v. Payne, 292 F. Supp. 1012 (D. Conn. 1968).

[475] *See* International Longshoreman's and Warehouse Union v. Ackerman, 82 F. Supp. 65, 85 (D. Hawaii 1949). *Compare with* United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1966).

[476] *See, e.g.*, Ball v. United States, 402 F.2d 206, 207 (D.C. Cir. 1968); Allen v. United States, 386 F.2d 634, 635 (D.C. Cir. 1967); United States v. Payne, 292 F. Supp. 1012, 1013 (D. Conn. 1968). *But see* United States v. Alston, 420 F.2d 176, 179 (D.C. Cir. 1969), wherein a court of appeals, in reversing a district court's order, concluded that the lower court overemphasized the defendant's conviction record. The court held that the criminal record is of little relevance in assessing the likelihood of flight where prior offenses do not reflect a propensity to abscond.

[477] *See, e.g.*, Wood v. United States, 391 F.2d 981, 984 (D.C. Cir. 1968) (wherein the Court remarked that while the defendant's record was by no means felicitous, nevertheless, he personally posed little risk of flight. It emphasized that particularly where a prior record of criminal proceedings against a defendant was available, information concerning any prior conditional releases and subsequent appearances for trial is clearly relevant); United States v. Cowper, 349 F. Supp. 560 (N.D. Ohio 1972); United States v. Figueroa, 347 F. Supp. 112 (D. Mass. 1972); United States v. Gillin, 345 F. Supp. 1145 (S.D. Tex. 1972); United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969); United States v. Payne, 292 F. Supp. 1012, 1013 (D. Conn. 1968).

[478] However, as District Court Judge Frankel has stated,

> while "danger to any other person or to the community" is not in itself a proper consideration for pretrial bail in a non-capital case, we doubt that a defendant's powerful disposition to incur further criminal liabilities could be ignored utterly in judging what will "reasonably assure" his appearace for trial.

United States v. Melville, 306 F. Supp. 124, 126-27 (S.D.N.Y. 1969).

[479] 18 U.S.C. § 3146(d) (1970).

[480] *Id.* § 3147(b).

[481] *Id.* § 3147(a).

bail, the court shall exercise supervision over their detainment. The attorney for the government is required to submit bi-weekly reports to the court listing each defendant so continued.[482]

## V. BAIL DURING TRIAL

Since 1789, the statutes of the United States have explicitly defined the right to bail *pending* trial. However, the question of bail *during* trial, until recently, existed in a rather nebulous state. Not until 1972 was there a statute in the United States respecting bail during the trial period.[483] Prior to that time, a defendant charged with an offense was not entitled to bail as a matter of right during his trial. This was the consistently supported view notwithstanding the "presumption of innocence secured only after centuries of struggle,"[484] which was, in this connection, relegated to a simple rule of evidence assigning the burden of proof and stripped of jurisprudential vitality.[485]

The issue of whether there existed a right to bail during trial was before a federal court for the first time in *United States v. Rice.*[486] Rice was on trial for utilizing the United States mails to implement a scheme to defraud. A bench warrant for the defendant was not issued until the trial was in progress. Rice was then ordered into the custody of the United States marshal for the duration of the trial. Bail was denied because, in the opinion of the trial court judge, Rice's presence at trial and the safety of the jury could only be maintained by holding Rice in actual custody. In examining the statutory law, the district court discovered it silent as to bail during trial. Reasoning from the existence of the void and from the fact that assurance of presence of the accused is a right inherent in the power of the court, the court concluded that mandatory custody during trial "is not in the legal sense an imprisonment or a punishment, but a necessary step in the due administration of justice."[487]

Later courts followed the holding of *Rice*[488] and have held that bail should not be granted during the course of a trial, and may, in fact, be withdrawn if the defendant is at large on bail, to insure the orderly progress of the trial.

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[482] FED. R. CRIM. P. 46(g) (as amended in 1972).

[483] *See* note 494 and accompanying text *infra*.

[484] Stack v. Boyle, 342 U.S. 1 (1951). *See also* Glynn v. Donnelly, 470 F.2d 95 (1972).

[485] *See* Hudson v. Parker, 156 U.S. 277, 285 (1895). There the Supreme Court noted,

> The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.

[486] 192 F. 720 (S.D.N.Y. 1911).

[487] *Id.* at 721. *See also* United States v. Hudson, 65 F. 68, 76 (W.D. Ark. 1894):

> Where [Congressional] . . . intent is expressed to the extent it is here, and there stops, the conclusion naturally follows that congress did not intend that the right of bail could be granted in any other cases than those that it has provided for by express enactment.

[488] *See, e.g.*, United States v. DiPietro, 302 F.2d 612 (2d Cir. 1962); United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961).

In *Fernandez v. United States,*[489] Justice Harlan, in his capacity as circuit justice, sustained the decision of a district court judge who had revoked bail on fifteen defendants who were on trial for conspiracy to violate federal narcotics laws. The judge issued his ruling because of a number of incidents including alleged threats made in the courtroom by three of the defendants to a government witness, alleged tampering with another witness, an alleged contrived automobile accident causing injuries to one of the defendants and interrupting the trial by about one week, and bail jumping by another of the defendants. Concurring with the affirmance of the Second Circuit Court of Appeals, Harlan reasoned that district courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during a criminal trial when such action is appropriate for the orderly progress of the trial and the fair administration of justice.[490]

A court of appeals extended the decision in *Fernandez* and reversed a trial judge's revocation of bail, ruling that, in order for there to be a denial of bail during trial, the threat to the orderly progress of the trial must be "substantial."[491] Other courts have held that the power to revoke must be exercised with circumspection.[492] In any event, it is not customary to revoke bail during trial because of the potential prejudice to a defendant in the eyes of the jurors.[493]

In 1972, the doctrine that had grown out of case law was codified by the United States Congress in rule 46(b) of the Federal Rules of Criminal Procedure:

> A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial.[494]

## VI. Release in Capital Cases and Upon Review

### a) *Capital Cases*

Although the Judiciary Act of 1789 eliminated the courts' discretionary power in non-capital, pre-trial bail cases, bail in capital cases[495] continued to lie within the discriminating power of the court."[496]

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[489] 81 S. Ct. 642 (Harlan, Circuit Justice, 1961).

[490] *Id.* at 644. *See also* United States v. Gilbert, 425 F.2d 490, 491 (D.C. Cir. 1969).

[491] Carbo v. United States, 288 F.2d 282 (9th Cir. 1961).

[492] Gavino v. MacMahon, 499 F.2d 1191, 1195 (2d Cir. 1974); United States v. Allison, 414 F.2d 407, 413 (9th Cir.), *cert. denied,* 396 U.S. 968 (1969); United States v. DiPietro, 302 F.2d 612, 614 (2d Cir. 1962). Further, in United States v. Gilbert, 425 F.2d 490, 492 (D.C. Cir. 1969), a court of appeals held that revocation can be effected only after the defendant is given a hearing affording him the opportunity to refute the charges raised in support of revocation.

[493] United States v. Parker, 91 F. Supp. 996, 999 (M.D.N.C. 1950). *See also* Dorman v. United States, 435 F.2d 385, 397 (D.C. Cir. 1970).

[494] Fed. R. Crim. P. 46(b) (as amended April 24, 1972).

[495] A "capital case" is herein defined as "one in or for which death may, but need not necessar-

There is no doubt that even the individual accused of an offense punishable by death must be presumed not guilty during trial. Operating to mitigate the influence of this theory is the very pragmatic observation, simply put in the interrogative by Blackstone: "For what is there that a man may not be induced to forfeit, to save his own life? and what satisfaction or indemnity is it to the public to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity?"[497] These two offsetting notions require that the greatest flexibility be permitted. Therefore, although American law has developed in a direction toward an alleviation of discretionary power prior to a formal adjudication of guilt, bail in capital cases is not allowed of right. To insure the presence of the accused at trial, and to safeguard society, each case is individually considered.

In the exercise of their discretionary bail power in capital cases, judges were required by the Judiciary Act of 1789 to consider "the nature and circumstances of the offense, and . . . the evidence, and the usage of the law."[498] In early decisions, the judiciary was singularly disinclined to grant bail in capital cases.[499]

The promulgation of the Federal Rules of Criminal Procedure in 1946 did not terminate the discretionary power. There was no substantial change from the wording of the Act of 1789.[500] In fact the clause pertaining to release in capital cases of subsection (a)(1) of rule 46 remained unchanged until October 1, 1972. The 1972 amendment recognized the subordination of the rule to the Bail Reform Act of 1966.[501] Section 3148 established a presumption of

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ily, be inflicted." BLACK'S LAW DICTIONARY 263 (4th ed. 1951). *See* Bakakos, *Bail in Capital Cases*, 56 CHI. B. REC. 154 (1974); Bennett, *Criminal Law: Right to Bail Pending Appeal from Conviction of Capital Offense*, 5 U. FLA. L. REV. 333 (1952); Cluff, *Failing Justification for the Capital Case Exception to the Right to Bail After Abolition of Death Penalty*, 10 SAN DIEGO L. REV. 349 (1973); Drinkwater, *Capital Offense Exception to Constitutional Bail Guarantee Unaffected by Abolition of Death Penalty*, 44 MISS. L.J. 565 (1973); Fields, *Determination of Accused's Rights to Bail in Capital Cases*, 7 VILL. L. REV. 438 (1962). *See also* Rakes v. United States, 212 U.S. 55 (1909); Comment, *Bail in Capital Cases After Furman: A Process Question*, 4 RUT.-CAM. L.J. 326 (1973). The conflict over *Furman's* effect on bail has been neglected here because of the Supreme Court's recent decisions. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[496] Ch. 20, § 33, 1 Stat. 91 (1789).

[497] 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294 (4th ed. 1770).

[498] *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91. *See also* Rev. Stat., tit. XIII, § 1016, at 189 (1893-1894).

In 1856, Judge Crawford, of the Criminal Court of Washington, D.C., in a habeas corpus hearing, ordered the release on recognizance of Philemon T. Herbert, who stood charged with murder, a capital offense. Crawford stated, however, that "[i]f the evidence had left room for debate whether the prisoner was guilty of murder or manslaughter, or was entitled to an acquittal, although the ground for such a debate might have been slight, I should have remanded him to prison." United States *ex rel.* Herbert v. Marshall of D.C., 26 F. Cas. 1172 (Crim. Ct. D.C. 1856) (No. 15,726a).

[499] *See* notes 425-31 and acompanying text *supra*.

[500] FED. R. CRIM. P. 46(a)(1) (1964). *See Ex parte* Monti, 79 F. Supp. 651 (E.D.N.Y. 1948).

[501] 18 U.S.C. § 3148 (1970), which reads in part:

releasability for the defendant in a capital case by requiring the court or judge to attempt to design conditions of release which might reasonably assure that the defendant will not abscond or pose a danger to any other person or to the community.[502] The judge's discretionary power is allowed to enter only when the conditions of section 3146 will not assure accountability or safety.

### b) *Release Pending Review*

The Judiciary Act of 1789 made no mention of bail in the post-trial stage.[503] The first statute to deal with the period after conviction was enacted in 1866.[504] The act, which reaffirmed the Supreme Court's power to issue a writ of error in certain cases coming from the highest court of a state,[505] reserved the question of bail on appeal in such cases to the discretion of the state court.[506] Since no writ of error lay from the Supreme Court to the federal circuit court or district court in criminal cases, the scope of the act regulated any grant of bail after trial.

In 1879, the various circuit courts were given jurisdiction over writs of error in all criminal cases tried before the district courts.[507] Section 2 of the 1879 enactment provided that if such writ were allowed to operate as a stay of proceedings, "bail *may* . . . be taken. . . ."[508] Ten years later, a statute was enacted which provided that final judgments of any court of the United States resulting in conviction of a crime punishable by death, shall, upon application, be "[r]eexamined, reversed, or affirmed by the Supreme Court" upon writ of error which was to act as a stay of proceedings.[509] In dictum, the Supreme Court in 1895 expressed skepticism as to whether Congress intended, by this Act, that the writ of error and stay of proceedings "should neither have the effect of discharging the prisoner from custody, nor of preventing his being allowed to bail, upon sufficient cause shown, pending the writ of error. . . ."[510] Further, in 1889, it was enacted that in cases where a

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> A person . . . who is charged with an offense punishable by death . . . shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist . . . the person may be ordered detained.

[502] White v. United States, 412 F.2d 145 (D.C. Cir. 1968).

[503] At common law, of course, bail after conviction was a matter of sound judicial discretion. *See* Rex v. Wilkes, 98 Eng. Rep. 327 (1770).

[504] Ch. 184, § 69, 14 Stat. 172 (1866).

[505] Ch. 20, § 25, 1 Stat. 85-86 (1789).

[506] The Statute was revised in 1873-1874. The phrase "the consideration of any statute of the United States" was replaced by the words, "the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States." The more meticulous wording was inspired perhaps by the Civil War amendments, and statutes.

[507] Ch. 176, § 1, 20 Stat. 354 (1879).

[508] *Id.* § 2.

[509] Ch. 113, § 6, 25 Stat. 656 (1889).

[510] Hudson v. Parker, 156 U.S. 277, 287 (1895).

final judgment was rendered by a circuit court and a jurisdictional question was involved, the party adversely affected by the judgment was to have the right to an appeal or a writ of error to the Supreme Court.[311] Two years later, in conjunction with the establishment of the circuit courts of appeals, a general review was formulated,[312] and rule 36 of the Supreme Court was promulgated.[313] The rule provided, *inter alia*:

> 2. Where such writ of error is allowed in the case of conviction of an infamous crime, or in any other criminal case in which [the writ will lie] the Circuit Court or District Court, or any Justice or Judge thereof, shall have power, to admit the accused to bail in such amount as may be fixed.[314]

Proceeding under the rule, the court in *United States v. Simmons*,[315] refused to allow bail in the case of a defendant whose conviction for embezzlement was pending on appeal before the Supreme Court. The court noted that rule 36 merely allowed the granting of bail on appeal; it left the question, however, within the discretion of the court.[316]

The theory upon which the rule was based was expounded by the Supreme Court in *Hudson v. Parker*:[317] "a person accused of crime, shall not, until he has been finally adjudged guilty by the court of last resort, be absolutely compelled to undergo imprisonment. . . ."[318] Shortly thereafter, in *McKnight v. United States*, the Court of Appeals for the Sixth Circuit strained the *Hudson* opinion and construed rule 36 as requiring courts to admit to bail where a meritorious question existed for review.[319] In 1909, however, another court of appeals synthesized the existing authorities and concluded that bail should be granted or denied on appeal "as best effects exact justice between the government and the defendant. . . ." Toward this end, the court suggested a standard for the exercise of its discretionary power based upon the character and urgency of the case, tempered by a desire to discourage resistance to the orderly operation of the law.[320]

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[311] Ch. 236, § 1, 25 Stat. 693 (1889).

[312] Ch. 517, 26 Stat. 826-30 (1891).

[313] Sup. Ct. R. 36(2), 139 U.S. 706 (1891).

[314] Authority for establishment of the rule was derived from the Judiciary Act of 1789, ch. 20, § 17(b), 1 Stat. 83, which granted the Court power "to make and establish all necessary rules for the orderly conducting [of] business in all courts of the United States."

[315] 47 F. 723 (C.C.S.D.N.Y. 1891).

[316] *See also* McKane v. Durston, 153 U.S. 684 (1894); *In re* Williams, 294 F. 996 (D.C. Cir. 1924).

[317] 156 U.S. 277 (1895).

[318] *Id.* at 285.

[319] McKnight v. United States, 113 F. 451 (6th Cir. 1902).

[320] *Ex parte* Harlan, 180 F. 119 (5th Cir. 1909), *aff'd sub nom.* Harlan v. McGourin, 218 U.S. 442 (1910). The need for a sense of awareness for unnecessary delays in the execution of a sentence was emphasized in *United States v. St. John*:

> There is a danger lurking in the too liberal exercise of the power to admit to bail as well as the arbitrary refusal to grant bail. Too frequently, after the defendant has been admitted to bail, his interest apparently lags, the appeal drags, the bill of exceptions is not promptly settled, and the record does not reach the appellate court as promptly as it should. There are inexcusable delays in securing the printing of the transcript—more

Other factors of consideration for regulating the allowance of bail pending appeal were later proposed. The Seventh Circuit, in rejecting a motion by a group of defendants convicted of conspiracy to violate the Espionage Act of 1917,[521] was guided by the following criteria: severity of the punishment, nature of the offense, health of the prisoner, character of the evidence, good faith back of the assignment of error, public welfare, and conduct of the accused.[522] In *Garvey v. United States*,[523] a court of appeals considered, *inter alia*, the prospect of success on appeal—a criterion which was later clarified in *United States v. Motlow*.[524] Justice Butler, as circuit justice, ruled that an application for bail on appeal need not show that the defendant is entitled to a reversal. Taking a position similar to that in *McKnight*,[525] Butler noted:

> The granting or withholding of bail is not a matter of grace or favor. If these writs of error were taken merely for delay, bail should be refused; but, if taken in good faith, on grounds not frivolous but fairly debatable, . . . then the petitioners should be admitted to bail.[526]

The other aforementioned criteria pertaining to the decision-making process apparently were disregarded.

In the same year, the Eighth Circuit Court of Appeals held that bail pending appeal was a matter of discretion, though it acknowledged that denial is rare. In the court's analysis, such extraordinary instances, forcing the rejection of requests for bail, were occasioned by the character of the accused, circumstances of the offense which justify apprehension concerning the potential flight of the defendant, offenses of an atrocious proportion, and frivolous appeals.[527]

Two of the above criteria, the character of the accused and the nature of the offense, are central considerations in the system of bail, a system which has as its primary objective the assurance of appearance.[528] The second standard, the possibility of the defendant's flight, was suggested by the absence of a presumption of innocence which was eliminated by the conviction.[529] Accordingly, this standard is not a factor of consideration in cases of bail pending trial. An "atrocity of the offense" standard was a primary considera-

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delays in printing and serving the briefs.
United States v. St. John, 254 F. 794, 798 (7th Cir. 1918).

[521] Ch. 30, 40 Stat. 231 (1917). The defendants were convicted of being members of the I.W.W. Judge Evans perceived the organization as "wholly at variance with the policy of this government during the war, and equally hostile to the welfare of people and industries entirely free from blame or responsibilities for this country's part in the war. . . ." United States v. St. John, 254 F. 794, 799 (7th Cir. 1918).

[522] United States v. St. John, 254 F. at 796.

[523] 292 F. 591 (2d Cir. 1923).

[524] 10 F.2d 657 (7th Cir. 1926). *See also* Bennett v. United States, 36 F.2d 475 (5th Cir. 1929).

[525] *See* note 519 and accompanying text *supra*.

[526] 10 F.2d at 662.

[527] Rossi v. United States, 11 F.2d 264 (8th Cir. 1926). *See also* Bennett v. United States, 36 F.2d 475 (5th Cir. 1929).

[528] *See* Jones v. United States, 12 F.2d 708 (4th Cir. 1926).

[529] Garvey v. United States, 292 F. 591 (2d Cir. 1923). *See also* United States v. Delaney, 8 F. Supp. 224 (D.N.J. 1934).

tion in *United States ex rel Estabrook v. Otis*,[530] in which the court denied bail to a petitioner who was serving a fifteen year sentence pursuant to a conviction for attempting to kill a judge. The court cautioned that bail should not be granted where the offense of which the defendant has been convicted is an atrocious one, and "there is danger that if he is granted freedom he will commit another of like character."[531] Finally, the "frivolous" appeal criterion assumed an important position in guiding the decisions of the judiciary in its deliberations in cases of bail pending appeal.

This "frivolous" standard placed the burden on the government to prove that an appeal was "clearly and palpably bad . . . ."[532] It was abandoned, however, in 1934, when Rule VI of the Criminal Appeals Rules took effect.[533] The rule provided that bail shall not be allowed pending appeal unless it appears that the appeal involves "a substantial question which should be determined by the appellate court."[534] In 1934, one year after the adoption of the new standard by the Supreme Court, a district judge observed that, "The shift from the use of 'frivolous' to 'substantial' would seem to be another indication of the still shifting emphasis. It apparently transfers the burden from the Government to the defendant. That has always been the law in England."[535] Rule VI was continued, essentially unchanged, by the Federal Rules of Criminal Procedure, adopted in 1946.[536]

It has been said that the construction of the words "substantial question" is itself a substantial question.[537] In *D'Aquino v. United States*,[538] Justice Douglas allowed bail for the appellant, Iva Ikuko D'Aquino ("Tokyo Rose"), convicted of treason and sentenced to imprisonment for ten years. Designing perimeters around the standard, Douglas suggested:

> The question may be 'substantial' even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may

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[530] 18 F.2d 689 (8th Cir. 1927). *See also* Rossi v. United States, 11 F.2d 264 (8th Cir. 1926).

[531] 18 F.2d at 690.

[532] *See* Oregonian Ry. Co. v. Oregon Ry. and Navigation Co., 22 F. 245 (9th Cir. 1884).

[533] Sup. Ct. R. 6, 292 U.S. 663 (1933). The rule was predicated on an Act of 1933, ch. 119, 47 Stat. 904, which authorized the Supreme Court to prescribe rules of practice with respect to procedure in criminal cases subsequent to verdict. Section 2 of the Act provided:

> The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and of preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

[534] 292 U.S. at 664.

[535] United States v. Delaney, 8 F. Supp. 224, 227 (D.N.J. 1934).

[536] FED. R. CRIM. P. 46(a)(2) (1946), "[b]ail may be allowed pending appeal or certiorari only if it appears that it involves a substantial question which should be determied by the appellate court. . . ." The Advisory Committee submitted 46(a)(2) with the language: "[b]ail *shall* be allowed. . . ." (Emphasis added). However, on 21 December 1944, Chief Justice Stone suggested that the word "shall" be changed to "may." *See* Williamson v. United States, 184 F.2d 280, 281-82 n.4 (2d Cir. 1950). Justice Jackson in *Williamson* utilizes this, along with other evidence, to support the proposition that the granting of bail after conviction is a matter of "sound judicial discretion."

[537] Herzog v. United States, 75 S. Ct. 349, 350 (Douglas, Circuit Justice, 1955).

[538] 180 F.2d 271 (9th Cir. 1950) (Douglas, Circuit Justice).

> be new and novel. It may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable. An appellant, though guilty beyond question, may have been denied the kind of trial that even a traitor to our country is entitled to under the Constitution and laws.[139]

In addition, the standard would have been deemed fulfilled by the Supreme Court if a contrariety of views existed in the several circuits or, in the instance of an application before a court of appeals, if directions were needed by district judges within a circuit.[140]

The purpose of the "substantial question" test of rule VI and rule 46(a)(2) as enacted in 1946, according to Judge Holtzoff, "was to restrict the enlargement of convicted defendants for a long period of time." Holtzoff noted that the clear result was a "defect in the administration of criminal justice."[141] In an attempt to remedy this defect, rule 46(a)(2) was amended in 1956 to resemble the pre-1933 rule: "Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. . . ."[542]

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[139] *Id.* at 272.

[140] Herzog v. United States, 75 S. Ct. 349 (Douglas, Circuit Justice, 1955).

In Bridges v. United States, 184 F.2d 881 (9th Cir. 1950), the court held that the existence of a "substantial question" for review transforms bail on appeal from a matter of grace to a matter of right. Bridges and two others were indicted on a charge of conspiracy to defraud the United States by impairing and defeating the proper administration of its naturalization laws by perjuring themselves at a naturalization proceeding, and before a district court by swearing falsely that Bridges had never belonged to the Communist Party. Bridges was subsequently found guilty. Pending appeal, bail was increased from $ 5,000 to $ 25,000. Shortly thereafter, the United States gave notice of a motion seeking revocation of bail. The motion was based on the ground that while appellant was at large on bail, "he had pursued and [would] continue to pursue, unless said motion was granted and said defendant remanded to the custody of the Marshal, a course of conduct and activities dangerous and detrimental to the public welfare and inimical to the safety and national security of the United States." *Id.* at 882. The motion was granted. Bridges then moved to vacate the revocation order. In rejecting the motion, the court exaggerated the importance of the "substantial question" standard to such a degree that it overshadowed the other criteria.

The question of whether an issue on appeal was "substantial" was merely one prerequisite for the exercise of discretion. As stated in United States v. Burgman, 89 F. Supp. 288, 289 (S.D.N.Y. 1950),

> two requisites must be met in order to justify the enlargement of a defendant on bail pending appeal. First, it must appear that the case involves a substantial question of law. Second, it must appear that the case is one in which, in the discretion of the Court, it is proper to grant bail.

This formula was employed by Justice Jackson in Williamson v. United States, 184 F.2d 280 (2d Cir. 1950) (Jackson, Circuit Justice). There, three Communist party leaders, convicted of conspiracy to advocate the overthrow of the United States government, applied to Jackson, in his capacity as circuit justice, for bail pending appeal. One appeal had already been had. After affirming the trial court's decision, the court of appeals extended bail for thirty days so that further application for review could be made to the circuit justice. Chief Judge Learned Hand, who had written the principal part of the opinion confirming the conviction, stated that he regarded the case as "involving substantial questions. . . ." Jackson accepted Hand's evaluation, and allowed bail, but noted, however, that, "[t]o remain at large, under bond, after conviction and until the courts complete the process of settling substantial questions . . . cannot be demanded as a matter of right. It rests in sound judicial discretion." *Id.* at 281.

[141] United States v. Burgman, 89 F. Supp. 288, 289 (D.D.C. 1950).

The new rule "greatly liberalized" the former standard.[543] The burden of proof once again rests with the government to demonstrate the absence of a "debatable question" and the improbability of reversal,[544] although it is incumbent upon the defendant to identify the questions for debate.[545] The legal merit of the question remains of primary importance.[546]

In examining the legal merit of a question, a variety of standards have been utilized. The first standard employed to gauge the "frivolous question" criterion is, obviously, the salience of the question.[547] In some cases, the fact that a question had not been previously determined was significant in evaluating the merit of the question.[548] Further, the existence of conflict among the courts;[549] the presence of confusion in the interpretation of prior decisions;[550] and the pendency of similar questions awaiting review[551] are important in the determination of whether or not an application for bail should be granted. In addition, under ordinary circumstances, there is an expressed reluctance on the part of appellate courts to interfere with the actions of lower courts in respect of bail applications.[552] Justice Douglas, in *Herzog v. United States*,[553] noted that a circuit justice should be most reticent to grant bail to an applicant who has been refused release by a district court and a court of appeals, not only because of the deference owed their judgments, but because of their immediate consanguinity to the case. However, when reasons are shown which justify a reversal of the judgment of the lower court, the superior courts are bound by rule 46(a)(2) to render an independent evaluation.[554] This responsibility is particularly clear when there exist circumstances unknown to the lower court judge at the time bail was denied,[535] or when the lower court has committed an error in law.[536] Also, if the lower court has not sufficiently stated its reasons for denial, the appellate court may hold the decision in abeyance pending action by the lower court.[537]

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[542] FED. R. CRIM. P. 46(a)(2) (as amended in 1956).

[543] Ward v. United States, 76 S. Ct. 1063 (Frankfurter, Circuit Justice, 1950); United States v. Piper, 227 F. Supp. 735 (N.D. Tex. 1964).

[544] United States v. Allied Stevedoring Corp., 76 S. Ct. 1068 (Frankfurter, Circuit Justice, 1956); Barnard v. United States, 309 F.2d 691 (9th Cir. 1962); Fiano v. United States, 259 F.2d 135 (9th Cir. 1968), *cert. denied*, 361 U.S. 964 (1960); United States v. Esters, 161 F. Supp. 203 (W.D. Ark. 1958).

[545] *See* Bowman v. United States, 85 S. Ct. 232 (Douglas, Circuit Justice, 1964).

[546] Alston v. United States, 343 F.2d 345 (D.C. Cir. 1964); Rhodes v. United States, 275 F.2d 78 (4th Cir. 1960).

[547] *See, e.g.*, Harris v. United States, 404 U.S. 1232 (Douglas, Circuit Justice, 1971); Sellers v. United States, 89 S. Ct. 36 (Black, Circuit Justice, 1968); Cohen v. United States, 82 S. Ct. 518 (Douglas, Circuit Justice, 1962); Bandy v. United States, 81 S. Ct. 25 (Douglas, Circuit Justice, 1960); Reynolds v. United States, 80 S. Ct. 30 (Douglas, Circuit Justice, 1959).

[548] *See, e.g.*, Cohen v. United States, 82 S. Ct. 518 (Douglas, Circuit Justice, 1962); Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962).

[549] *See, e.g.*, Clark v. United States, 74 S. Ct. 357 (Douglas, Circuit Justice, 1953).

[550] *See, e.g.*, Herzog v. United States, 75 S. Ct. 349 (Douglas, Circuit Justice, 1955).

[551] *See, e.g.*, Pryor v. United States, 404 U.S. 1242 (Douglas, Circuit Justice, 1971).

[552] *See, e.g.*, Harris v. United States, 404 U.S. 1232 (Douglas, Circuit Justice, 1971); Reynolds v. United States, 80 S. Ct. 30 (Douglas, Circuit Justice, 1959); DiCandia v. United States, 78 S. Ct. 361 (Harlan, Circuit Justice, 1958); Roth v. United States, 77 S. Ct. 17 (Harlan, Circuit Justice, 1956); Ward v. United States, 76 S. Ct. 1063 (Frankfurter, Circuit Justice, 1956).

[553] 75 S. Ct. 349 (Douglas, Circuit Justice, 1955).

[554] Leigh v. United States, 82 S. Ct. 994 (Warren, Circuit Justice, 1962).

If the court determines that the question is of sufficient merit, *i.e.*, beyond frivolous, and not taken merely for delay,[538] bail on these grounds will not be denied.[539] However, other grounds may justify denial, or prove prominent in the establishment of the conditions of release. The likelihood of flight is one such ground.[540] In arguing for denial it is incumbent upon the government to display a strong probability that the defendant will become a fugitive.[541] A frequently cited consideration in determining bailability is whether the applicant, if released, would pose a danger to any other person or to the community.[542] This factor is particularly material where the safety of a witness is involved.[543] Danger to the community subsumes the likelihood that the applicant will, if released,[544] repeat the act or offense for which he was convicted; this consideration, however, is not a proper consideration where the defendant attacks the constitutionality of the violated statute on grounds which the Government admits are not frivolous.[545] Further, the right to bail upon review is not to be denied merely because of the community's sentiment against the accused or because of the defendant's "evil reputation."[546] Other considerations include the ability of a defendant to give bail, the nature of the offense, the penalty imposed, the defendant's character, the evidence on which the conviction was based, the statement of the Government, the demeanor of the defendant on examination in open court, and the defendant's attitude toward the legal process.[567] Denial of bail for the purpose of punishment has been rejected, since the judgment of conviction cannot be executed while the matter is stayed pending appeal.[568]

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[535] *See, e.g.*, Costello v. United States, 74 S. Ct. 847 (Jackson, Circuit Justice, 1954); Williamson v. United States, 184 F.2d 280 (2d Cir. 1950).

[536] *See, e.g.*, Ward v. United States, 76 S. Ct. 1063 (Frankfurter, Circuit Justice, 1956).

[537] *See, e.g.*, Febre v. United States, 396 U.S. 1225 (Harlan, Circuit Justice, 1969); United States v. Allied Stevedoring Corp., 76 S. Ct. 1068 (Frankfurter, Circuit Justice, 1956).

[538] In United States v. Waldman, 240 F.2d 449 (2d Cir. 1957), the court noted that the rule implies that bail may be revoked where delay becomes apparent.

[539] United States v. Davis, 37 F.R.D. 450 (D.D.C. 1965). *See also* Leigh v. United States, 82 S. Ct. 994 (Warren, Circuit Justice, 1962); Cohen v. United States, 82 S. Ct. 526 (Douglas, Circuit Justice, 1962); Ward v. United States, 76 S. Ct. 1063 (Frankfurter, Circuit Justice, 1956); United States v. Stanley, 469 F.2d 576 (D.C. Cir. 1972).

[540] Ward v. United States, 76 S. Ct. 1063 (Frankfurter, Circuit Justice, 1956); Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962); United States v. Galente, 308 F.2d 63 (2d Cir. 1962); Carbo v. United States, 302 F.2d 456 (9th Cir.), *aff'd*, 82 S. Ct. 662 (Douglas, Circuit Justice), *rehearing denied*, 396 U.S. 868 (1962); Rhodes v. United States, 275 F.2d 78 (4th Cir. 1960); Blessingame v. United States, 242 F.2d 313 (9th Cir. 1957); Anthony v. United States, 250 F.2d 427 (9th Cir. 1957); United States v. Piper, 227 F. Supp. 735 (W.D. Tex. 1964); United States v. Davis, 178 F. Supp. 919 (N.D. Ill. 1959); United States v. Crawley, 23 F.R.D. 215 (W.D.S.C. 1959); United States v. Allied Stevedoring Corp., 143 F. Supp. 947 (S.D.N.Y. 1956).

[541] Rhodes v. United States, 275 F.2d 78 (4th Cir. 1960).

[542] Leigh v. United States, 82 S. Ct. 994 (Warren, Circuit Justice, 1962); United States v. Davis, 37 F.R.D. 450 (D.D.C. 1965).

[543] *Compare* Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962) *with* Sica v. United States, 82 S. Ct. 669 (Douglas, Circuit Justice, 1962).

[544] Hairston v. United States, 343 F.2d 313, 315 (D.C. Cir. 1965); Pannell v. United States, 320 F.2d 698-99 (D.C. Cir. 1963) (Wright, J., concurring).

[545] Leigh v. United States, 82 S. Ct. 994 (Warren, Circuit Justice, 1962).

[546] Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962). *See also* Cohen v. United States, 82 S. Ct. 8 (Douglas, Circuit Justice, 1961).

In 1966, the Bail Reform Act was enacted. As noted, the purpose of the Act was to eliminate unnecessary detention. Therefore, the standards established for the setting or denying of release after conviction were, primarily, the same as those provided for in cases of bail prior to trial.[569] If the court had reason to believe that not one or more of the considerations of release listed in section 3146 of Title 18 would reasonably assure appearance[570] and prevent danger to any person or to the community, or if the appeal were frivolous or taken for delay,[571] the applicant could be detained. Rule 46[572] placed the burden of establishing the good potential of the accused on the accused himself. The rationale for the assignment of the burden of proof is that conviction justifies retention in custody in situations where doubt exists as to whether a defendant can be safely released pending either sentence or the granting of appeal.[573] The court must follow the "extraordinary-case standard" when exercising its discretionary power.[574] In granting or denying bail, and in setting the terms of release, the same basic standards considered in the past by the courts are still in effect, with the addition of a new factor injected by the Bail Reform Act: a policy against unnecessary detention.

## SUMMARY

The roots of bail extend deep into English law. Bail originated as a device to insure the payment of "wergeld." It later developed into a mechanism for freeing untried prisoners. Bail's function is not only to give liberty to a prisoner, but to secure the extent of the law. Thus, the recurring question for those charged with designing the bail system has been where to strike the balance between the individual and social character of man. This article has examined the changing answer to that question. It was found that the balance has generally moved toward the individual. But though the scope of the right has improved for the individual, the depth of the right remains unchanged. It continues to be but a statutory right.

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[567] *See* United States v. Piper, 227 F. Supp. 735 (N.D. Tex. 1964) and cases cited therein.

[568] *See* Reynolds v. United States, 80 S. Ct. 30 (Douglas, Circuit Justice, 1959).

[569] *See generally* notes 416-82 and accompanying text *supra*.

[570] Government of the Virgin Islands v. Callwood, 296 F. Supp. 943 (D.V.I. 1969).

[571] 18 U.S.C. § 3148 (1970).

[572] Section (c), as amended 1972.

[573] Leary v. United States, 431 F.2d 85 (5th Cir. 1970); United States v. Quicksey, 371 F. Supp. 561 (S.D. W. Va. 1974).

[574] United States v. Coppola, 280 F. Supp. 192 (D. Conn. 1968).

Bail as it is known today in the United States did not develop in a New World vacuum but descended directly from English traditions. An exposition of those traditions, as well as an examination of the development of bail in the United States hopefully will benefit not only legal scholars but, perhaps more importantly, those actively involved in the further evolution of the system.

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# THE COMING CONSTITUTIONAL CRISIS IN BAIL: I*

CALEB FOOTE †

One striking manifestation of the resurgence of concern for the administration of criminal justice which characterizes the present decade is the attack upon the inadequacies and unfairness of the bail system as it affects indigent defendants. Unlike other areas of ferment in criminal law administration, this changing attitude toward bail is the only major reform of recent decades in which the courts have played a wholly passive role. With search and seizure and indigents' right to counsel the Supreme Court has warned, cajoled and, finally becoming impatient with the snail-like pace of reform, forced major change down the throats of the states by way of the fourteenth amendment.[1] The Court's initiative in these areas has precipitated a storm of controversy and created constitutional crises both in police operations and in the court practices of those states which had previously failed to make provision for assigning counsel to indigents in all cases.

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Strangely enough, however, the courts have remained almost entirely silent in the face of mounting documentation of the discriminatory effect upon indigents of the bail bond system's requirement of financial security for pretrial release. The studies which have been made in the

indigent discrim. against by $ bond

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* This is part I of a two-part article. Part II will appear in the June issue.

† Professor of Law, University of Pennsylvania. A.B. 1939, Harvard University, M.A. 1941, Columbia University, LL.B. 1953, University of Pennsylvania. Member, Pennsylvania Bar.

[1] Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

last decade[2] have established three things which, when they finally find their way into the grist of litigation, seem bound to pose most serious constitutional questions.

First, it has been established that pretrial imprisonment of the poor solely as a result of their poverty, under harsher conditions than those applied to convicted prisoners, so pervades our system that for a majority of defendants accused of anything more serious than petty crimes, the bail system operates effectively to deny rather than to facilitate liberty pending trial.[3]

non-bail only jail

Second, it is also apparent that but for their poverty a substantial proportion of these jailed indigent defendants would never suffer any imprisonment because, after serving their pretrial jail term, they are either not convicted[4] or the disposition of their cases does not include imprisonment.[5]

Third, there is an extraordinary correlation between pretrial status (jail or bail) and the severity of the sentence after conviction, the jailed defendant being two or three times more likely to receive a prison sentence.[6] The last finding raises difficult problems of evaluation, for some other variable may be an important factor in causing both the pretrial jail status and the more severe sentence, although the most recent study shows that the ratio holds constant even when some of the more obvious variables are controlled.[7]

These findings as a whole reveal a shocking discrepancy which disadvantages the poor in our administration of criminal justice. It is probable, moreover, that the evidence summarized above does not reveal the full extent of the discrimination. For example, there has been no adequate investigation of the mechanics of the guilty plea, although we know that this is the predominant means of conviction.[8] While the statistical data in the bail studies of the possible correlation between pretrial jail status and increased likelihood of conviction is incomplete, the subtleties involved in the guilty plea will require a more searching analysis than can be provided by conviction rate statistics. It is plausible, at least, that denial of pretrial liberty provides a psychological inducement to plead guilty which would be absent if the defendant were at liberty pending trial.[9]

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[2] Foote, Markle & Wooley, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954) [hereinafter cited as *Philadelphia Bail Study*]; Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641 (1964) [hereinafter cited as Rankin]; Note, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958) [hereinafter cited as *New York Bail Study*]. Some of these studies and numerous other recent investigations are summarized in Freed & Wald, Bail in the United States: 1964, 9-21 (Report to the National Conference on Bail and Criminal Justice, 1964) [hereinafter cited as Freed & Wald]. For references to other published studies see *id.* at 112-16.

[3] See, *e.g.*, *Philadelphia Bail Study* 1032-33; *New York Bail Study* 711-12; Rankin 634; Freed & Wald 15-16.

[4] *E.g.*, Rankin 642 (27% of sample of 358 jailed defendants were not convicted); *Philadelphia Bail Study* 1052, Table 1 (depending on offense, proportion of jailed defendants not convicted ranged from 7% to 27%); *New York Bail Study* 726-27.

[5] Rankin 642 (9% of those tried, convicted but not sentenced to prison); *Philadelphia Bail Study* 1040 (23% of those tried given suspended sentence, 9% sentenced to time already served); *New York Bail Study* 727 (13.5% of those sentenced given suspended sentence, 2.6% sentenced to time already served).

[6] Rankin 642; *Philadelphia Bail Study* 1054; *New York Bail Study* 727.

[7] Rankin 655.

? If guilty, why not so plead?

*Recent reform efforts*—The first move generated by these findings to ameliorate the unfairness of the bail system for the poor has not necessitated and thus has entirely bypassed litigation of constitutional questions. Starting with the creation by a New York businessman of the Vera Foundation and its sponsorship of the Manhattan Bail Project, a reform movement to develop procedures for the prompt pretrial release without financial security of reliable but impecunious defendants is now spreading rapidly through the country with the endorsement of the Department of Justice and the support of the Ford Foundation.[10] As developed in New York, the plan provides for a brief interview with an indigent defendant before his preliminary hearing where probable reliability of the defendant in appearing for trial is estimated by the application of plausible (but untested) assumptions. Information is sought as to his prior record, residence patterns, current and recent employment and references, and family ties in the jurisdiction after which there is a quick verification of the data by telephone or from available official records. A defendant meeting sufficiently high standards will be recommended to the court for release without security.

Recently the Vera Foundation and the New York Police Department have launched another experimental program designed to reduce further the incidence of pretrial detention.[11] At several precinct station houses in New York, law students acting as Vera investigators go to work as soon as those accused of disorderly conduct, simple assault, or petit larceny are brought in after arrest. If on the basis of quick investigation the accused is recommended by Vera as a good risk, the precinct desk officer may order release and issue a summons for the date and place at which the accused is to appear in criminal court. For minor offenses this represents a long overdue reform.

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[8] See Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 46-47 (1964); Note, *Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 865-66 & n.4 (1964).

[9] See Packer, *supra* note 8, at 39-40.

[10] FREED & WALD 59-64, and references cited *id.* at 114-15. For a description of other reform efforts in recent years, see *id.* at 64-83.

[11] FREED & WALD 72-73.

Admirable as these developments are, however, they provide no cure-all for indigent bail problems. Even in a jurisdiction with an extensive project a substantial proportion of urban indigent defendants would not meet the standards of reliability which have so far been applied and would not obtain a recommendation of release. Further, a proportion of those recommended would not be released, the number depending upon the extent of judicial sympathy and cooperation with the plan. Political considerations may additionally limit the plan's operation, for example, the Manhattan Bail Project's exclusion of past or current narcotics and sex offenders and those currently charged with assault against police officers. But a more important limiting factor is the necessity of obtaining popular approval for the establishment of the plan in each community, and, as even the Ford Foundation's resources are not inexhaustible, of securing continuing financial support through local appropriations. While one would hope that our administration of criminal justice will one day be able to accomplish a major reform in the interest of fairness to the defendant without having to be coerced by the Supreme Court,[12] prior experience gives no indication that such a day is at hand. The sluggishness of the states in responding to the indigent counsel problem is not encouraging. Despite decades of judicial prodding and reform effort, in 1963 there were still "nearly 40 counties with populations of 400,000 or more which have no organized [defender] services whatsoever," and many existing facilities were rated inadequate.[13]

For two categories of indigent defendants administrative bail reform offers little immediate prospect of relief. The first are the defendants brought to trial in jurisdictions having no "Vera" or other reform plans; the second are those denied relief within a reform jurisdiction. Between them they will comprise the great majority of all indigent defendants for at least several decades. For such defendants the only foreseeable remedy lies in constitutional adjudication within the judicial system. Because of the publicity being given this problem and our growing sensitivity about unfairness in our criminal procedure resulting from poverty, it is a fair guess that the next major clash between our norms of actual administration and the constitutional theories expounded in recent years by the Supreme Court will revolve around the discrimination against the poor which is inherent in the bail system. Yet any satisfactory resolution of the constitutional questions is likely to prove extremely difficult. Compared with other due process problems which have arisen in recent years, bail presents differences in the treatment of the poor which are more pervasive and pernicious. The stakes for the defendant and the state are higher, and values critical to the present age are more sharply in conflict with the force that is generated by centuries of accumulated habit and unquestioned tradition. There would today be little dispute with the judgment that "one of the prime objectives of the civilized administration of justice is to render the poverty of the litigant an irrelevancy," [14] and that the provision of as equal justice as is practicable is a constitutional mandate as well as a policy goal. But for centuries we have also placed almost exclusive reliance for the regulation of pretrial detention and the production of defendants in court upon a bail system which not only uses financial incentives as a deterrent to flight but also delegates to private bondsmen much of the policing which enforces appearance in court, and have accumulated almost no experience with alternative measures.

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[12] See the observation of Attorney-General Kennedy, Law Day Address, University of Chicago Law School, May 1, 1964: "[T]he fundamental question remains: Should there ever have been a need for the *Gideon* decision? Did we need a Constitutional determination to tell us our professional responsibilities?"

[13] Marsden, *The Lawyer's Response to the Demand for Both Stability and Change Through Law*, 17 VAND. L.J. 125, 132 (1963).

DP and poor

Nor are there any easy alternatives for an accommodation of nondiscriminatory protection of defendants' access to pretrial freedom and suitable regard for the state's interest. In some European countries, bail is either not authorized, as in Sweden, where it is "considered to lead to inequality before the law," or, although provided for by law, has fallen into disuse, as for example, in Norway, Denmark, West Germany.[15] In these and other European countries the right to release turns on nonfinancial factors such as the degree of risk that during pretrial liberty the accused might flee, commit crimes, or tamper with the evidence. Where such risks are high, release can be denied altogether, or lesser security measures may be employed—for example, a ban on travel or requirement that the accused report periodically to the police.

It is immediately apparent, however, that any attempted adoption of the substantive European law of detention would pose tremendous problems. For one thing, the apparent simplicity and rationality of individualizing the detention decision to the particular circumstances of the particular defendant is largely deceptive. In the best adjudicatory climate the determination of such vague predictive criteria as future dangerousness or possible flight is necessarily unreliable, and under the actual conditions by which the pretrial detention determination is made in this country the probability of maladministration is

prediction problem

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[14] Att'y Gen. Comm. on Poverty and the Administration of Federal Criminal Justice, Report, 5-6 (1963) [hereinafter cited as Att'y Gen. Rep.].

[15] Bratholm, *Arrest and Detention in Norway*, 108 U. Pa. L. Rev. 336, 347-48 (1960).

infinite. Even in Scandanavian countries, where the substantive law is applied by a trained, career judiciary with a tradition of much greater leniency to defendants than obtains in this country, the results appear to be very uneven. Although the substantive legal principles governing detention "are generally coincident in the three countries" of Norway, Denmark and Sweden, Bratholm has reported that detention is significantly more frequent in Oslo than in Copenhagen and at least four times more frequent than in Stockholm.[16] Bratholm attributes the discrepancy to "the tendency of Norwegian courts and police to exploit the institution [of detention] for purposes not recognized by the Criminal Procedure Act," [17] but one would expect that the vagueness of the concepts applied would produce unevenness of administration in any event. If a criterion such as future dangerousness were applied in America, it is predictable that the magistrates and lower judiciary who today deliberately set high bail for indigents to prevent their release would have an equal opportunity to obtain the detention of the poor, the friendless, and the Negro by labelling them "dangerous."

Even more critical, a proposal to substitute European individualized discretion for our present absolute right to bail would require us to reexamine our fundamental concepts of the criminal trial process in an adversary system. Any resolution of the detention problem involves an allocation of inescapable costs. Someone has to pay a price for the fact that we have to have a pretrial period between accusation and final adjudication. If defendants are kept locked up, the cost is borne by those among them who are innocent or prejudiced by the detention. If they are all released, society pays in those cases where the defendant flees or commits new crimes. In theory our system inclines to the second alternative. As Justice Jackson said, "the spirit of the [bail] procedure is to enable . . . [defendants] to stay out of jail until a trial has found them guilty"; the resulting danger to society "is a calculated risk which the law takes as the price of our system of justice."[18] It is true that these words of Justice Jackson sound a hollow and hypocritical note when they are read against the facts of day-to-day bail administration, for our law as actually administered puts most of the cost upon the shoulders of the poor who are detained and not upon society. But there is a value in unrealized ideals, and to close the gap between ideal and reality by abandoning the ideal is not a course lightly to be undertaken. The concept that accused persons should not be punished prior to a finding of guilty has deep roots in our culture, with no fully comparable history in Europe, and under our adversary system we have felt it peculiarly appropriate that the accused have the opportunity of "searching for evidence and witnesses, and preparing a defense."[19]

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[16] Bratholm, *supra* note 15, at 342-43.

[17] *Id.* at 343.

[18] Stack v. Boyle, 342 U.S. 1, 7-8 (1951) (concurring opinion).

This policy problem is further complicated by the ambiguous and uncertain status of bail in the federal constitutional system. Standing alone, the excessive bail clause of the eighth amendment poses puzzling questions of interpretation and historical analysis. In addition, as applied to indigents, any rights alleged under the eighth amendment overlap broader due process and equal protections claims inherent in the financial discrimination and prejudice of the bail system. If one indulges in the assumption that the present blatant financial discrimination of the bail system cannot long survive the current renaissance of interest in equal justice for the poor, then it makes a critical difference whether the Court finds a resolution of the problem in an interpretation which reads the eighth amendment as including a right to pretrial release or, on the other hand, bypasses the eighth amendment and fashions a less sweeping and more flexible remedy in the name of due process and equal protection. By the former holding the kind of solution which the Europeans have evolved would be constitutionally proscribed, but if the second path is followed we might well end up with a system almost indistinguishable from that of the continent.

Accordingly this article first examines in some detail the threshold question: does the eighth amendment import a right to bail? It is my thesis that the particular form in which the bail question appears in the Constitution is the result of an historical accident, and that the most plausible resolution of this constitutional riddle is to find an intention to grant such a right. Second, if one assumes a right to bail, what constitutional meaning is to be attached in the case of indigents to the requirement that such bail shall not be "excessive"? The third section poses a hypothetical case which raises the major constitutional questions to suggest the kinds of problems with which the courts will be faced during the next decade. Finally, we will consider some of the policy and administrative problems which would be created by either an eighth amendment or a due process-equal protection resolution of the discrimination question.

Introductive summary

## I. THE EIGHTH AMENDMENT AND RIGHT TO BAIL

Recognition of the importance of bail in order to avoid pretrial imprisonment was a central theme in the long struggle to implement the promise of the famous 39th chapter of Magna Carta that "no freeman shall be arrested, or detained in prison . . . unless . . . by the law of the land."[20] It is significant that three of the most critical steps in this process—the Petition of Right in 1628,[21] the Habeas Corpus Act of 1679,[22] and the Bill of Rights of 1689[23]—grew out of cases which alleged abusive denial of freedom on bail pending trial.

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[19] *Ibid.*

*Darnel's Case* in 1627[24] involved five knights who had been thrown in prison by Charles I and who brought an action for habeas corpus at the king's bench. The return of the prison warden merely recited that Darnel "was and is committed by the special command of his majesty, &c."[25] Serjeant Bramston opened for his client by stating that "it is his petition, that he may be bailed from his imprisonment . . . for it being before trial and conviction had by law, it is but an accusation, and he that is only accused ought by law to be let to bail."[26] Counsel for another of the knights asked "how can the court adjudge upon this return, that Sir John Corbet ought be kept in prison, and . . . that he is not bailable?"[27] The Attorney General argued[28] that the version of Magna Carta chapter 39, enacted in 1354[29] upon which the petitioners relied did not apply to pretrial imprisonment.[30] It was his position that only imprisonment pursuant to "final prosecution" must be "by due process of law"; the pretrial period "is not within the meaning of the statute."[31] When the judges proved their subservience to the King by denying release, the case was taken up in Commons as soon as Parliament convened early the next year. In the debates[32] which ensued during the preparation of the Petition of Right there was repeated discussion of the fact that, if the decision in *Darnel's Case* stood, it would impair the effectiveness of the Statute of Westminster the First of 1275[33] which governed admission to bail; thus Coke stated that "the cause of imprisonment must be known, else the statute will be of little force . . . ."[84]

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[20] The translation is that adopted in 1 CHAFEE, DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 249, 251 (1963).

[21] 1628, 3 Charles 1, c. 1.

[22] 1679, 31 Charles 2, c. 2.

[23] 1689, 1 W. & M. st. 2, c. 2.

[24] 3 How. St. Tr. 1 (1627).

[25] *Id.* at 3.

[26] *Id.* at 6-7.

[27] *Id.* at 25.

[28] *Id.* at 39.

[29] 1354, 28 Edw. 3, c. 3: "Item, That no man . . . shall be . . . taken nor imprisoned . . . without being brought in answer by due process of the law." 1 CHAFEE, *op. cit. supra* note 20, at 254. Note the first use of "due process of the law" for Magna Carta's "the law of the land."

[30] 3 How. St. Tr. at 39.

[31] *Ibid.*

[32] The entire proceedings appear in 3 How. St. Tr. 59-234, immediately following the report of *Darnel's Case.*

[33] 1275, 3 Edw. 1, c. 15.

It was against this background that the Petition of Right was adopted[85] and received from Charles I the grudging answer, "Soit droit fait come il est désiré par le Petition."[86] Reciting the abuse of cases like that of Darnel, the Petition prayed that "no freeman in any such manner as is before mentioned, be imprisoned or detained"[87] and thereby brought the force of Magna Carta to bear upon pretrial imprisonment.

Not quite half a century later, on June 27, 1676, one Jenkes was arrested and imprisoned, apparently for inciting to riot in making a speech asking that Charles II be petitioned to call a new Parliament.[88] The charge was one which by statute required that Jenkes be admitted to bail, but on the following August 18 he was still trying in vain to get anyone to set and take his bail, and he was ultimately released only by an informal process.[89] Cases such as Jenkes' in turn contributed to the enactment of the great Habeas Corpus Act of 1679, which recited that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable . . . ."[90] The act provided in great detail for an habeas corpus procedure which plugged the loopholes and made even the king's bench judges subject to penalties for noncompliance.

The Act of 1679 stopped the procedural runaround to which Jenkes had been subjected, but by setting impossibly high bail the judges erected another obstacle to thwart the purpose of the law on pretrial detention. When, therefore, Parliament drew up a Bill of Rights which was accepted by William and Mary as they assumed the throne, one of the abuses by which the late King was alleged to have tried "to subvert . . . the laws and liberties of the kingdom" was that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects."[41] The remedy which followed was the language with which we are concerned: "That excessive bail ought not to be required . . . ."[42]

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[84] 3 How. St. Tr. at 69. Coke also invoked the Bible: "I will conclude with the highest authority, that is, 25 chap. of the Acts of the Apostles, the last verse, where St. Paul saith, 'It is against reason to send a man to prison without shewing a cause.'" *Ibid.* See also *id.* at 74, 78, 87-88.

[85] *Id.* at 221-24.

[86] *Id.* at 230.

[87] *Id.* at 224, ¶ x.

[88] Jenkes' Case, 6 How. St. Tr. 1189, 1208 (1676).

[89] The King ordered his release on bail after the Lord Chief Justice, apparently suffering pangs of conscience because he believed bail "could not be denied," went to the Lord Chancellor, who sent him to the Lord Treasurer, who sent him to the King, who "immediately commanded that the laws should have their due course." *Id.* at 1207-08.

[90] 1679, 31 Charles 2, c. 2.

Two things stand out in this history. The first is that relief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law. The evils which were being combatted were obvious; as Jenkes said in one of his futile petitions:

> My Lord, I have been imprisoned since the 28th of June, to my great loss, charge, and prejudice of my health. I have hitherto been denied bail, Habeas Corpus and the Writ of Main-prize; which I am informed, were never before denied to any of his majesty's subjects in the like case . . . . I do not beg a discharge, for I desire nothing more than to clear my innocence by a public trial.[43]

His friends added that without bail "he might lie there all his life-time without trial, which no subject ought to do."[44]

We should note, second, that as the English protection against pretrial detention evolved it came to comprise three separate but essential elements. The first was the determination of whether a given defendant had the right to release on bail, answered by the Petition of Right, by a long line of statutes which spelled out which cases must and which must not be bailed by justices of the peace or (in the early period) by sheriffs, and by the discretionary power of the judges of the king's bench to bail any case not bailable by the lower judiciary. Second was the simple, effective habeas corpus procedure which was developed to convert into reality rights derived from legislation which could otherwise be thwarted. Third was the protection against judicial abuse provided by the excessive bail clause of the Bill of Rights of 1689.

three-pronged protection

The protective structure thus stands like a three-legged stool, but when the Americans strengthened and converted their English statutory legacy into constitutional dogma they unaccountably left off one of the legs. This is the heart of the federal constitutional problem. The principle of habeas corpus found its way into Article 1, section 9 of the Constitution, while the excessive bail language of the 1689 Bill of Rights was included in our eighth amendment. But the underlying right to the remedy of bail itself, which these enactments supplemented and guaranteed, was omitted.

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[41] Bill of Rights, 1689, 1 W. & M., st. 2, c. 2, preamble, clause 10.

[42] Bill of Rights, 1689, 1 W. & M., st. 2, c. 2, rights, clause 10.

[43] 6 How. St. Tr. at 1205.

[44] *Id.* at 1206.

Thus removed from its English historical context and standing, as it is, incomplete and alone, the excessive bail clause of the eighth amendment represents some of the most ambiguous language in the Bill of Rights. It is susceptible of at least three interpretations:

(1) Bail cannot be demanded in an excessive sum in cases made bailable by other provisions of law, but the clause of itself imports no right to bail.[45] Such an interpretation reaches the extraordinary result of a constitutional provision being merely auxiliary to some other law, which in the federal system must be statutory. It requires one to believe that a basic human right would be deliberately inserted in a constitution in a form which permitted Congress to restrict it at will, or even to render the eighth amendment entirely moot by enacting legislation denying the right to bail in all cases. Such legislative power is consistent with the English theory of civil liberties, in which Parliament itself constitutes the ultimate authority from which there is no other protection, but would constitute an anomaly in the American Bill of Rights whose central concern was protection against abuse by Congress. The difficulty is compounded when it is recalled that the other clauses in the eighth amendment—no excessive fines and no cruel and unusual punishment—traditionally have been interpreted to protect against abuse of legislative but not of judicial discretion.[46]

This first interpretation, moreover, leaves the amendment meaningless in the absence of legislation establishing the scope of the right to bail. The problem of such a patently incomplete constitutional protection on the subject of bail led most states, therefore, to supplement the excessive bail clause by a clause granting the right to bail in all noncapital cases. The two clauses were first found side by side in the North Carolina Constitution of 1776 and the Pennsylvania Constitution of 1790, and the pattern was widely copied in other states in the nineteenth century.[47] The same anomaly would become acute in the federal system if the eighth amendment clause were held applicable to the states through the fourteenth amendment. Since the federal statutory right to bail could not be incorporated for this purpose, the Court would have to adopt one of the following alternative interpretations.

(2) Bail cannot be demanded in an excessive amount in cases in which the court sets bail, but in the absence of other statutory or

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[45] See People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498 (1943).

[46] See Gallege v. United States, 276 F.2d 914, 918 (9th Cir. 1960); Papendrea v. United States, 275 F.2d 325 (9th Cir. 1960); United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).

[47] See N.C. CONST., Declaration of Rights, § x (Dec. 18, 1776); PA. CONST. art. ix, §§ 13, 14 (1790). See, *e.g.*, CONN. CONST. art. 1, § 14; N.J. CONST., art 1, ¶ 10.

constitutional restriction the court retains discretion to deny bail altogether.[48] This widely-held interpretation fails to give effective protection even against judicial action, let alone possible legislative abuse. By making the clause say to the bail-setting court that it may not do indirectly what it is, however, permitted to do directly—deny release—the clause is reduced to the stature of little more than a pious platitude. If this is what the clause means, any purported application of it to the states through the fourteenth amendment would in practice amount only to a meaningless formality.[49] Men such as George Mason and James Madison, who were primarily responsible for the draftsmanship of the eighth amendment, felt with intensity the importance of what they were doing. It is difficult to believe that as to bail they intended nothing more than to play games with words.

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(3) The excessive bail clause implies a constitutional right to bail. This frequently stated interpretation has been reached by finding that as a necessary implication[50] or because of the difficulty of the alternatives posed above or, as suggested below, because it may be the interpretation most consistent with the historical evolution of the eighth amendment. One problem with this approach is that the precise scope of the "right" is undefined; for example, does it apply in capital cases, on appeal, or to allegedly especially dangerous offenders? Much more difficult is the obvious objection that if the founders intended by the eighth amendment to establish the right to bail in all or most cases, why did they not say so directly instead of clothing their purpose in ambiguity? They had ample colonial precedents for a forthright declaration of a right to bail, going back to the Massachusetts Body of Liberties in 1641. Indeed, only two years before the Bill of Rights was debated in Congress the Continental Congress had inserted as one of the protections enacted as part of the Ordinance to govern the Northwest Territory a bail guarantee which, omitting any reference to "excessive" bail, provided that "all persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great."[51] This language, in turn, found

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Ordinance

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[48] See Carlson v. Landon, 342 U.S. 524, 544-46 (1952) (alternative holding); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740 (1960); *Ex parte* Voll, 41 Cal. 29, 31-32 (1871).

[49] For an example of such gamesmanship see Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964).

[50] *E.g.*, Carlson v. Landon, 342 U.S. 524, 554-58 (1952) (Black & Burton, JJ., dissenting). United States v. Motlow, 10 F.2d 657, 659 (7th Cir.) (Butler, Circuit Justice, 1926): "The provision forbidding excessive bail would be futile if magistrates were left free to deny bail."

[51] An Ordinance for the government of the Territory of the United States North-West of the River Ohio, July 13, 1787, art. ii.

its way into the Judiciary Act[62] which was debated in the first Congress concurrently with the debate on the proposed Bill of Rights.

Jud. Act + Const. Am

While the paucity of direct evidence relevant to the enactment of the eighth amendment precludes a satisfactory historical answer to this interpretive riddle, much can be learned from an examination of how the precise language of the eighth amendment clause, and only this language, found its way to the floor of the first Congress. Contemporary American and English bail law is also significant in ascertaining the probable intention behind the use of the clause and is highly relevant to any attempt to accommodate the language of the amendment to the policy problems of current criminal administration.

### *A. The First Congress and the Colonial Experience With Bail*

The bail problem was before the first Congress in the spring and summer of 1789 in two separate legislative packages: the excessive bail clause as one of the proposed amendments to the Constitution, and section 33 of the Judiciary Act extending an absolute right to bail in all noncapital federal criminal cases. Madison first announced his intention of introducing constitutional amendments in the House on May 4,[63] actually proposed them on June 8,[64] and reintroduced them on July 21.[65] The House sent seventeen proposed amendments to the Senate on August 24[66] and on September 21 concurred in the Senate's action reducing the number of amendments to twelve.[67] Meanwhile the Judiciary Act was drafted in a Senate committee between April 7 and June 12,[68] passed the Senate July 17,[69] was debated in the House on August 29 and 31[70] and, after some negotiation between the two branches, was finally completed with Senate passage on September 29.[71]

Timing on Const. and Jud. Act

Both the amendments and the Judiciary Act were controversial and were related, at least as perceived by opponents of the establishment of a system of lower federal courts who sought both to obtain an amendment negating such a system and to defeat the plan in the Judiciary Act.[62] But most of the vigorous debate on the Bill of Rights turned on the question of whether or not any amendments at all were needed and the House debate on the Judiciary Act was almost entirely concerned with the lower federal court proposal.[63] Debate on the merits of particular proposals in either legislation was otherwise meagre or absent. As to bail there is no record of any debate in either House or Senate on the right to bail provision of the Judiciary Act, and there are only a few lines in the House record[64] and nothing in the Senate's as to the excessive bail amendment.

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[62] 1 Stat. 91, § 33 (1789). Substantially the same provision now appears in FED. R. CRIM. P. 46.

[63] 1 ANNALS OF CONG. 247 (1789-91) (pagination in citations to the ANNALS in this article is that found in the version known as 1 DEBATES & PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES: 1789-1791 (1834)). For a discussion of this session of Congress see RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 197-215 (1955) [hereinafter cited as RUTLAND].

[64] 1 ANNALS OF CONG. 424, 433-36 (1789-91); RUTLAND 206-07.

[65] RUTLAND 206-07.

[66] RUTLAND 209.

[67] RUTLAND 215. These were submitted to the states, and ten of them received the necessary approval and came into effect in 1791. *Id.* at 233 & n.1.

[68] 1 ANNALS OF CONG. 18, 46 (1789-91).

[69] *Id.* at 50.

[70] *Id.* at 796-833.

[71] *Id.* at 92, 93.

Split in bail protections

In short, I have found nothing to indicate that anyone in Congress recognized the anomaly of advancing the basic right governing pretrial practice in the form of a statute while enshrining the subsidiary protection ensuring fair implementation of that right in the Constitution itself. Each bail provision was enacted as originally proposed, on the one hand, by Madison, and on the other, by the Senate committee. There is no evidence in Madison's speech in the House on June 8, in which for the first time he revealed the proposed content of the Bill of Rights, that he had any knowledge of what the Senate committee was about to recommend on the subject of bail. It is equally unlikely that the Senate committee, which had already been working for two months on the Judiciary Act and which reported its draft bill only four days after Madison's speech, was influenced in drafting its bail proposal by either that speech or by any knowledge that a constitutional amendment on the subject might be enacted at some indefinite time in the future. Whereas in June even the desirability of any bill of rights was uncertain, passage of a judiciary act was recognized as an immediate necessity.[65] There is, therefore, no evidence in the concurrent consideration of the Bill of Rights and Judiciary Act of any deliberate congressional intention to exclude a right to bail under what became the eighth amendment.

Even if what happened in Congress in 1789 is not helpful in resolving the anomaly of the eighth amendment, we are fortunate in having other evidence which goes far to explain how this curious development occurred. Just as the right to bail statute and the excessive bail amendment were apparently independently conceived and considered in the Congress, they were the products of two entirely different chains of historical development.

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[62] See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 123 (1923).

[63] 1 Annals of Cong. 796-809, 812-15, 825-65 (1789-91).

[64] *Id.* at 754; see text accompanying note 121 *infra*.

[65] See the remarks of Congressman William Smith on August 13:

> The Constitution establishes three branches to constitute a whole; the Legislative and Executive are now in existence, but the Judicial is uncreated. While we remain in this state, not a single part of the revenue system can operate; no breach of your laws can be punished; illicit trade cannot be prevented.

1 Annals of Cong. 705 (1789-91).

The first of these separate chains was the background English history to which we have already made reference. By the time of the American revolution, English bail law was a tangled morass. The basic Statute of Westminster the First of 1275[66] provided a detailed enumeration of what offenses sheriffs must bail or could not bail and remained the basic guideline "for five centuries and a-half."[67] It represented a reaction against abuses which had developed under earlier law which gave sheriffs discretion whether or not to admit to bail.[68] In succeeding centuries many additional statutes were piled one upon another as the power to bail was transferred from the sheriff to the justice of the peace and as Parliament sought to check illegal bailing of nonbailable offenders.[69] Such English bail statutes were important matrices in the struggle which shaped our criminal procedure.[70] As we have already noted, the detailed statutory pattern was reinforced by the Petition of Right, the Habeas Corpus Act and the excessive bail clause of the 1689 Bill of Rights.

Rt. to bail
background

This confusing legislative patchwork quilt was not discarded until well into the nineteenth century, when by 7 Geo. 4, c. 64, and 11 & 12 Vict., c. 42, s. 23, all prior legislation was repealed and, in a major modification of policy, the justices of the peace were given discretionary power to grant or deny bail in all felonies or common law misdemeanors.[71] But at the time of the enactment of the eighth amendment the basic pattern was legislation which either required the justice to admit to bail or to deny it. There were two exceptions to this nondiscretionary policy. One was the fact that during the proliferation of statutes after 1275 there crept in a third category of cases, described by Blackstone as "of a dubious nature," which "seem to have been in the discretion of the justices, whether bailable or not."[72] Second, the statutes all related to the bailing power of the justice of the peace or, in very early times, the sheriff. Cases which the justices were forbidden to admit to bail were apparently always bailable in the discretion of a higher judge or court such as the king's bench;[73] in any event that power was settled by the Petition of Right of 1628 and in the Parliamentary debate of that year it was stated that this discretionary power to bail even the most serious cases "the constant practice hath been anciently and modernly to bail men . . ."[74]

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[66] 1275, 3 Edw. 1, c. 12.

[67] 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 236 (1883). For the purposes of this article the term "bail" is used for any release on security without regard to the ancient distinctions among bail, mainprise or the writ *de odio et atia*. See 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 587-90 (2d ed. 1898). As to the very early origins of the procedure, see DE HAAS, ANTIQUITIES OF BAIL (1939).

[68] 1 STEPHEN, *op. cit. supra* note 67, at 236. For the importance of the sheriff's judicial role in the 13th century, see STENTON, ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER 1066-1215, at 80-82 (1964).

[69] 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW 526-28 (3d ed. 1945); 1 STEPHEN, *op. cit. supra* note 67, at 235-37.

[70] *Id.* at 237. For example, we have already noticed that the evolution of habeas corpus was closely tied to abuses of bail law. The bail legislation of 1486 was part of the tightening up on judicial administration which included the creation of the Star Chamber, and an act touching bailment of persons, 1554, 12 Phil. & M., c. 13, a statute designed to guard against collusion in granting bail, for the first time made provision for what became the preliminary hearing.

[71] *Id.* at 238.

judge discretion

When one turns to prerevolutionary America the English statutory pattern was in force in at least some of the colonies.[75] In New York, the Charter of Liberties and Privileges of 1683 incorporated a right to bail which excepted "treason or felony plainly and specially Expressed and menconed in the Warrant . . ."[76] As this limitation is taken almost verbatim from the Habeas Corpus Act's clause excepting the same class from the act, and as its reenactment in 1691 expressly referred to English bail law,[77] it serves as another indication of the interrelationship of English and some colonial legislation.

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[72] 4 Blackstone, Commentaries 296 (1st Am. ed. 1772).

[73] 1 Stephen, *op. cit. supra* note 67, at 243.

[74] *Proceedings in Parliament relating to the Liberty of the Subject*, in 3 How. St. Tr. 59, 154 (1628).

[75] 2 Statutes at Large of S.C. 452, 481 (Cooper 1837) (enacting basic English bail statutes, for example Bail Act, 1487, 3 Hen. 7, c. 3; Bailment of Persons Act, 1554, 1 & 2 Phil. & M., c. 13); see Keith v. Barton, 2 Hill 214 (S.C. 1834). In Georgia, the Statute of Westminister First of 1275, 3 Edw. 1, c. 15, was declared in force in a codification of Schley, A Digest of the English Statutes of Force in the State of Georgia 83 (1826), and presumably was regarded as in force during the colonial period. Several basic English bail statutes were included in the Province of North Carolina Act of 1749 "to put in Force in this Province" many English statutes. See Brown, *British Statutes*, in American Law 1776-1836, at 360, 366, 368 (1964). The North Carolina Act, however, was disallowed by an order in council. *Id.* at 17.

[76] 1 N.Y. Colonial Laws 111, 114 (1894).

[77] Act Declaring Rights and Privileges, May 13, 1691, in *id.* at 244, 247, qualified the limitation of the English Habeas Corpus Act, 1679, 31 Charles 2, c.2, by adding the following language: "and that the fellony be such as is restrained from Bayle by the Law of England."

As to the confused status of these charters in colonial New York see Bradford, Laws and Acts of the General Assembly for Their Majesties Province of New York at cxii (Fowler facsimile ed. 1894):

> The act [of 1691] itself, like its predecessor, the celebrated "Charter of Libertys" of 1683, was finally vetoed by the crown, but without seriously curtailing the liberties of the people, or altering the constitution of the province, already settled on the basis of English public law.

See also 1 Hamlin & Baker, Supreme Court of Judicature of the Province of New York 1691-1704, at 378-89 (1959); they quote from another source that a reason

By far the most significant thing about the colonial experience, however, was an entirely indigenous development which deviated sharply from English precedent and which ultimately produced the language of the Judiciary Act adopted by the first Congress. This stream goes back to the Massachusetts Body of Liberties in 1641, which included the following provision:

> 18. No mans person shall be restrained or imprisoned by any Authority what so ever, before the Law hath sentenced him thereto, If he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behavior in the meane time, unlesse it be Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court [*i.e.* legislature] doth allow it.[78]

Where this major bench mark in American bail history came from appears to be a mystery; there was certainly nothing like it in England. According to Winthrop, the Body of Liberties resulted from the desire to substitute "positive laws" for those cases in which the magistrates "might proceed according to their discretions." [79] The clause was reenacted in 1648 as part of the first comprehensive codification in the colony.[80]

The Massachusetts pattern reappeared in numerous forms along the way to the first Congress of 1789. In 1682 it was stated in the fundamental law of Pennsylvania[81] in a form which reappeared in North Carolina in 1776[82] and later was widely copied in 19th century state constitutions: "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great . . . ."

In the decade immediately preceding debates in the first Congress, the Massachusetts influence appeared again in two important acts. In the fall of 1776 the Virginia legislature ordered a complete "revisal"

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for the royal disallowance of the 1691 charter was that it gave too great and unreasonable privileges to the province. *Id.* at 385 n.196. In 1853 it was held that the 1683 charter was not in force in New York, but with some implication that the 1691 charter survived the English disallowance. See Van Winkle v. Constantine, 10 N.Y. 422, 427-28 (1853).

[78] *Massachusetts Body of Liberties*, in Massachusetts Colonial Laws 37 (Whitmore ed. 1887). For a recent construction of this clause, which is still in force in Massachusetts, to permit discretion in granting bail in capital cases see Commonwealth v. Baker, 343 Mass. 162, 177 N.E.2d 283 (1961).

[79] Quoted in Haskins, Law and Authority in Early Massachusetts 36 (1960). Winthrop specifically wished "a body of grounds of laws, in resemblance to a Magna Charta, which . . . should be received for fundamental laws." *Ibid.*

[80] Laws and Liberties of Massachusetts of 1648, at 28 (Farrand ed. 1929).

[81] *Laws Agreed Upon in England, May 3, 1682*, in Proceedings Relative to Calling the Conventions of 1776 and 1790, at 26, 28 (1825).

[82] N.C. Const. Declaration of Rights § x (Dec. 18, 1776).

of its laws[83] to adapt them "into conformity with republican principles,"[84] and delegated the task to a small committee of which Jefferson was a member.[85] As part of this work Jefferson drafted a bill which entirely eliminated any judicial discretion as to whether bail should be granted "if the crime be punishable in life or limb, or if it be manslaughter, and there be good cause to believe the party guilty thereof, he shall not be admitted to bail; all other cases are bailable."[86] Another bill in the "revisal" was an act "for Proportioning Crimes and Punishments in Cases Heretofore Capital,"[87] in which Jefferson propounded his occasionally strangely repressive and sometimes brilliantly radical proposals for criminal law reform.[88] Read together, the two bills provide a comparatively liberal bail structure. Aside from treason and murder, where capital punishment was retained, statistically important crimes like burglary, housebreaking, all forms of larceny and horsestealing were made noncapital and thereby bailable. Jefferson had some strange notions about rape, sodomy and maiming of which he later recanted,[89] and whether these offenses were intended to be bailable depended upon whether, for example, cutting through the cartilage of the nose "a hole of one half inch diameter at the least" constituted a crime punishable in life or limb" (and thereby nonbailable).[90]

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[83] For an account of this activity, the text of the proposed statutes and their disposition in the legislature see 2 THE PAPERS OF THOMAS JEFFERSON 305-665 (Boyd ed. 1950).

[84] *Id.* at 305.

[85] The committee first met in January, 1777 to divide up the work. Jefferson, *Autobiography*, in 1 WRITINGS OF THOMAS JEFFERSON 1, 58 (Ford ed. 1892). Two years later the members came together with their products and "meeting day by day, we examined critically our several parts, sentence by sentence, scrutinizing and amending until we had agreed on the whole." *Id.* at 61. The committee's report, with full notes and annotations, is published in 2 THE PAPERS OF THOMAS JEFFERSON 305-665 (Boyd ed. 1950). Originally there had been five members of the committee, but two withdrew and "Jefferson was nominally and actually the leading figure in the revisal." *Id.* at 313. The "revisal" is an extraordinary document of legislative reform, all the more remarkable when one considers that Jefferson had no budget, no research assistants or advisory committees, and that during these same two years he was involved in the day to day work of the Virginia legislature where his legislative "accomplishment . . . was astonishing. He was in himself a veritable legislative drafting bureau." *Id.* at 306. The "revisal" is most widely known for its Act for Establishing Religious Freedom, *id.* at 545, its democratization of descent law, *id.* at 391-93 (abolishing primogeniture) and its proposals on education, *id.* at 526 (free public elementary schools for all children), *id.* at 535 (transformation, complete with proposed curriculum, of William and Mary College into a university), *id.* at 544 (public library, really a center for advanced study and research, to be created at Richmond). These projects have overshadowed many important proposals for reform of civil law, *e.g.*, *id.* at 626 (legal aid) and criminal law and procedure with which much of the "revisal" was concerned. *E.g.*, *id.* at 103 (criminal procedure); notes 86-87 *infra.*

[86] *Id.* at 481.

[87] *Id.* at 492-507. Unlike most of the rest of the "revisal," Jefferson appended to this bill numerous annotations and comments.

[88] *Compare* the proposals for hanging and then gibbeting some murderers, *id.* at 495, or castrating, *inter alia*, those guilty of polygamy, *id.* at 497, *with* the abolition of the felony murder rule, *id.* at 496, the cogent reasons advanced for the abolition of suicide and bestiality as crimes, *id.* at 496-97, the rejection of the English statute which made concealment by the mother of the death of a bastard child murder, *id.* at 494, and the general moderation of the penalties substituted for capital punishment.

[89] On the provision of the lex talionis for these crimes Jefferson later wrote: "How this last revolting principle came to obtain our approbation, I do not remember." Jefferson, *Autobiography*, in 1 WRITINGS OF THOMAS JEFFERSON 1, 60 (Ford ed. 1892).

This Virginia "revisal of the laws" did not reach the Virginia legislature until 1785. Jefferson being out of the country, Madison introduced the bills[91] and was thus acquainted at first hand with the liberal, nondiscretionary approach to bail which characterized this stream of colonial development. Many years later Jefferson paid tribute to "the unwearied exertions of Mr. Madison" in steering the revision through the legislature "in opposition to the endless quibbles, chicaneries, perversions, vexations and delays of lawyers and demilawyers . . . ."[92] The end result was anomalous: the bail bill was adopted but the crimes act defeated in the House by a single vote,[93] leaving a bail provision designed to be broad rather restrictive instead.

Va. law

In 1787 this preconstitutional liberal trend culminated in the Continental Congress with the adoption of the Northwest Ordinance, to which we will return in a moment, guaranteeing an absolute right to bail in noncapital cases in terms substantially identical to those used in Pennsylvania in 1682.[94]

By the time of the first Congress, then, American experience had gone far beyond contemporaneous English law in the scope given the right to bail.[95] Haskins' comment about the significance of the bail provision in the Massachusetts Body of Liberties is equally applicable to Pennsylvania and the Virginia Revision: "In the simplicity of its administration, as well as in the protection that it afforded to the accused, the colonial practice was certainly far in advance of the English."[96] This in turn was part of a broad humanization of the criminal law which ran far ahead of contemporaneous English thought and practice. This liberalization was not just the example of a Jefferson who was decades if not centuries ahead of his own time[97] but was characteristic of influential colonial opinion. The Quaker leadership of Pennsylvania won world-wide renown for their progressive leadership in penology, while in Massachusetts

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[90] 2 PAPERS OF THOMAS JEFFERSON 497 (Boyd ed. 1950).

[91] *Ibid.*

[92] Jefferson, *Autobiography*, in 1 WRITINGS OF THOMAS JEFFERSON 1, 62 (Ford ed. 1892).

[93] 2 THE PAPERS OF THOMAS JEFFERSON 481, 506 (Boyd ed. 1950). Madison wrote Jefferson that "The rage against Horse stealers had a great influence on the fate of the [crimes] Bill. Our old bloody code is by this event fully restored. . . ." *Id.* at 506.

[94] See note 51 *supra.*

[95] There may be other colonial material which I have not been able to find, but this analysis is persuasive in view of the well established trends in the major colonies of Massachusetts, Pennsylvania and Virginia.

[96] HASKINS, *op. cit. supra* note 79, at 199.

[97] *Compare, e.g.,* 2 PAPERS OF THOMAS JEFFERSON 496 (Boyd ed. 1950) (Virginia "revisal" proposal to abolish the felony murder rule by abrogating transferred intent), *with* British Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, § 1.

> . . . no more striking or important example of the influence of Puritan beliefs upon the law can be found than in the procedures developed for dealing with criminal offenses. The evidence of the court records provides notable illustrations of the extent to which the magistrates directed the criminal law of the colony away from traditional concepts of retribution which permeated English criminal law, toward practices which emphasized moral persuasion in order to reform the offender. . . . The colonial laws . . . prescribed relatively mild punishments for crimes such as theft and burglary for which many hundreds of Englishmen were sent to the gallows every year.[98]

Equally striking are the opposing tendencies in English and American law with regard to the amount of discretion extended to the judiciary in the determination of right to release on bail. We have seen in England a movement from the legislation of 1275 which, reacting against abuse of discretion, imposed upon the lower judiciary a nondiscretionary pattern, through centuries in which there was a slow accretion of some discretionary power, with an ultimate substitution in the nineteenth century of a broad judicial discretion in place of legislative definition of the scope of the right. By the time this last stage had been reached, America had moved so far in the other direction that, usually by explicit state constitutional provision or, as in the federal system, by statute, the right to bail had become absolute in all noncapital cases. Thus Jefferson's Virginia bill was explicit in depriving the justice of all discretion, providing punishment if he "let any go at large, on bail, who is not bailable, or refuse to admit to bail any who have right to be so admitted . . . ."[99] At the time of the first Congress, the American trend towards a fixed absolute right was already well advanced, but the significant change in England towards discretion was still largely in the future.

Summary

In the light of this history on both sides of the Atlantic, statements such as the following by the New Jersey Supreme Court are incomprehensible: "At common law . . . in this country . . . the grant of bail in all cases rested in the discretion of the courts."[100] The only authorities cited for this proposition were three cases involving capital offenses. Similarly barren of relevant authority are comparable declarations in California[101] and New York.[102] In *Carlson v. Landon*, a 5-4 majority of the Supreme Court held that alien communists under deportation charges are not entitled to bail under the eighth amendment.[103] The rather cavalier paragraph by which the majority disposes of the issue is ambiguous. It concludes only that the amendment "does not require that bail be allowed under the circumstances of these cases," but earlier the Court implied that in any event the excessive bail clause does not confer a right to bail in ordinary criminal prosecutions. The court states that the English excessive bail clause "has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." Aside from the misleading use of the word "proper," as if the court regarded propriety as a judicially instead of legislatively determined factor, the authority cited to support the statement indicates that the majority misunderstood English bail law as it then existed. For this sentence the Court referred to the section of an 1824 English bail treatise which dealt with the common law powers of the court of king's bench to bail in their discretion offenses made nonbailable by statute.[104] Of course this discretionary power to afford relief for meritorious but nonbailable cases is entirely irrelevant to the issue of what relationship may exist between an excessive bail clause and the right to bail. This misconception about the relative distribution of bail power among the various English courts and the fact that American courts seem not to have realized that the bail powers of the justices of the peace have been largely discretionary only since 1826 may be responsible for the error of assuming English bail law always to have been discretionary.[105]

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[98] HASKINS, *op. cit. supra* note 79, at 204, 211. But of course the Massachusetts pattern cannot be characterized as "humanitarian in any modern sense," for the "colonial laws extended the penalty of death to several offenses" not so punished in England. The crimes taken off the death list, however, were those which numerically were most frequent.

[99] 2 THE PAPERS OF THOMAS JEFFERSON 481 (Boyd ed. 1950).

Carlson

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[100] State v. Konigsberg, 33 N.J. 367, 370, 164 A.2d 740, 742 (1960).

[101] *Ex parte* Voll, 41 Cal. 29, 31-32 (1871).

[102] People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498 (1943). The court held that N.Y. Code Crim. Pro. § 553, providing that bail is discretionary in felony cases, was constitutional notwithstanding an excessive bail clause in the New York Constitution. The discretionary power to deny bail under this statute, however, has been very narrowly construed in New York. See *New York Bail Study* 697-98.

[103] Carlson v. Landon, 342 U.S. 524, 545-46 (1952).

[104] PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL (1824). The Court's citation, 342 U.S. at 545 n.43, is to page "483 *et seq.*" At 483-87 is the section on the powers of the court of king's bench. Petersdorff's summary of the applicable statutory law is at 475-82.

[105] Of course it is with the period prior to 1826, when bail power was substantially not discretionary, with which we are exclusively concerned in trying to ascertain the intention of our first Congress.

### *B. The Unknown Social History of Bail*

How well a bail system works in effectuating the policy of releasing defendants prior to conviction cannot be ascertained from reading constitutions, statutes, and cases. A future historian who had only such sources available to him in trying to ascertain what was actually going on today would be completely misled, for although our paper rights cast us in a very liberal light, our practice is in fact quite repressive. What we need is a social history of bail which would allow us to compare actual pretrial practices in relevant periods of history. Such data does not exist and cannot be reconstructed. All we can find are hints from which we guess how much risk society really took and how the costs of a pretrial administration were actually allocated between the defendant and the state in any given period. But such guesses are hazardous. The Statute of Westminster the First, which provided a substantial list of offenses which were bailable even though together with a longer enumeration of nonbailable crimes, also suggests at least a certain liberality. Indeed, our "historical evidence" indicates that in England in the thirteenth and fourteenth centuries pretrial detention was actually rarely utilized.[106] It is difficult, however, to draw any useful conclusions from these facts about how early English bail policy actually worked in practice. Not only were most of the seriously accused excluded because of the proliferation of capital crimes, but primitive procedures for dealing with persons accused removed many more from the pretrial population. In 1275 both outlawry[107] and the hue and cry were still extant; in the thirteenth century "this [hue and cry] barbaric justice is ridding England of more malefactors than the king's courts can hang."[108] Under either of these procedures the question of what to do with a man between arrest and trial was entirely moot, because there was no pretrial period to speak of and virtually no trial, the culprit being hustled to his death in short order. Society can perhaps afford the luxury of a liberal bail procedure if it is certain that all the really dangerous and obviously guilty defendants have been hanged first. In any event, even more than today, bail legislation on the statute books probably bore little relation to the actualities of practice.

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[106] 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 584 (2d ed. 1898): "It was not common to keep men in prison. This apparent leniency of our law was not due to any love of an abstract liberty. Imprisonment was costly and troublesome. . . . [and] there were many ways out of it. . . . The sheriff did not want to keep prisoners; his inclination was to discharge himself of all responsibility by handing them over to their friends." *Ibid.*

[107] For a discussion of "outlawry" see *id.* at 580-81.

[108] *Id.* at 579.

> When a felony is committed, the hue and cry (*hutesium et clamor*) should be raised. . . . The neighbours should turn out with the bows, arrows, knives, that they are bound to keep and, besides much shouting, there will be horn-blowing; the "hue" will be "horned" from vill to vill.
>
> Now if a man is overtaken by hue and cry while he has still about him the signs of his crime, he will have short shrift. Should he make any resistance, he will be cut down. But even if he submits to capture, his fate is already decided. He will be bound, and, if we suppose him a thief, the stolen goods will be bound on his back. He will be brought before some court (like enough it is a court hurriedly summoned for the purpose), and without being allowed to say one word in self-defence, he will be promptly hanged, beheaded or precipitated from a cliff, and the owner of the stolen goods will perhaps act as an amateur executioner.

*Id.* at 578-79.

Emphasis has been given above to the importance of the Massachusetts Body of Liberties of 1641 in that it deviated from and liberalized English bail law. But the theoretical liberality of that 1641 bail statute should not be overdrawn. Massachusetts punished with death and therefore made nonbailable the offenses of

> idolatry, witchcraft, blasphemy, bestiality, sodomy, adultery, rape, man stealing, treason, false witness with intent to take life, cursing or smiting a parent, stubbornness or rebelliousness on the part of a son against his parents, and homicide committed with malice prepense, by guile or poisoning, or suddenly in . . . anger or cruelty or passion.[109]

Here Massachusetts did soften the more barbaric law of England—most notably, the list of capital offenses omits burglary, robbery and larceny while its oddities can be explained by an examination of the book of Deuteronomy to which the Puritans were so devoted. But it would be fallacious to compare the Massachusetts statute with contemporary provisions using almost identical language. Social conditions doubtless made it much harder in fact for an accused to flee the jurisdiction, probably detention facilities were inadequate, and the general immobility of the population imposed risks on society of a very different order.

However, there is some Massachusetts data suggesting that the liberality of the written law was reflected in practice although the details of actual administration are substantially unknown. The published records of some seventeenth century Massachusetts courts indicate that it was routine to release pending trial defendants charged with such serious and sometimes capital offenses as: burglary, theft, aggravated assault and battery, attempted rape, bigamy, fornication and bastardy (the favorite offenses of that colony at that time), arson, infanticide, manslaughter and blasphemy.[110] Some New York records suggest similar liberality, for example, release in cases of sedition, riot, treason, theft and murder, together with one instance of bail pending appeal following imposition of the death sentence.[111] There are scattered instances of pretrial practice in the court records of other colonies, and the frequent declarations of forfeiture also attest to a common pattern of pretrial release.[112] When bond was required commital to jail was the alternative to putting up the required security; but in the great majority of instances cited, the record shows that the accused was actually released. While these colonial practice materials which have been available to me are fragmentary, I have found in them no indication of anything other than liberal administration of the relatively liberal colonial laws. They constitute some evidence of the attitude which the former colonists brought with them to independence and constitution-making.

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[109] HASKINS, *op. cit. supra* note 79, at 145-46.

[110] A particularly useful and vivid account of lower court practice in Massachusetts is COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1639-1702): THE PYNCHON COURT RECORD (J. Smith ed. 1961). For references to pretrial release see *id.* at 151, 153, 281 (burglary), 292 (aggravated assault and battery), 316 (theft), 389-90 (at-

### *C. The Virginia Declaration of Rights*

It is probably not surprising that for nearly ninety years after Parliament had enacted the English Bill of Rights there appears to have been no reference to excessive bail in any American legislation. The charter-making period of colonial history had been completed by the end of the seventeenth century and in any event the colonists, as British subjects, assumed they were protected by the principles of such basic English legislation as Magna Carta, the Habeas Corpus Act, and the Bill of Rights.[113] In any event, the excessive bail proviso of the

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tempted rape?). See also 2 Maine Province & Court Records (Libby ed. 1931), at 104-05 (stealing), 424 (bigamy); 3 Maine Province & Court Records (Moody ed. 1947), at 65 (perjury), 258 (murder), 258-59 (attempted rape of nine year old girl), 273 (assault); 4 Maine Province & Court Records (Allen ed. 1958), at 282 (theft), 288-89 (attempted rape?), 310-11 (bond pending appeal), 341 (fornication, bastardy), 341-42 (manslaughter?), 373-74 (infanticide); *Records of the Suffolk County Court 1671-80*, in 29 Publications of the Colonial Society of Massachusetts (1933), at *e.g.*, 86-87 (blasphemy), 150 (bigamy), 310 (theft).

[111] 1 Hamlin & Baker, *op. cit. supra* note 77, at 60 n.51, 169 n.66 (murder), (theft), 287-89 (practice of courts in hearing bail cases), 307 (pending appeal of death sentence); 2 Hamlin & Baker, Supreme Court of Judicature of the Province of New York 1691-1704, at 110-12 (1959), 246-48 (riot), 289 (treason); 3 Hamlin & Baker, Supreme Court of Judicature of the Province of New York 1691-1704, at 49 (1959) (sedition).

[112] Court Records of Kent County, Delaware 1680-1705 (1959), at 294-95; Court Records of Prince Georges County, Maryland 1696-1699 (1964), at 460 (maiming); 2 Rhode Island Court Records 1662-1670 (1922), at 13, 37, 52; The Superior Court Diary of William Samuel Johnson 1772-1773 (Farrell ed. 1942) (Connecticut), at xliii (counterfeiting, etc.).

References to forfeitures appear in the sources cited in notes 110-11 *supra*. See, *e.g.*, 2 Hamlin & Baker, *op. cit. supra* note 111, at 288; *Records of the Suffolk County Court*, *supra* note 111, at 183, 442, 478 (remission), 409 (fornication and bastardy, surety charged also with support of child).

[113] See, *e.g.*, resolutions 5-7 of the *Declaration and Resolves of the Continental Congress, Oct. 14, 1774*, in 1 Journals of the Continental Congress, 1774-89 63-73 (Wash. 1904) (assuming protection from English law).

1689 Bill of Rights was merely one segment of the English history, and we have already noted that the preamble of this clause makes it abundantly clear that its only purpose was to shore up the enforcement of preexisting rights to bail. The relatively subsidiary importance of the clause in English law is illustrated by Blackstone's relegation of it to a single sentence buried in the middle of a five-page chapter on bail.[114]

But in June of 1776, less than a month before the proclamation of the Declaration of Independence in Philadelphia, the Virginia legislature enacted the famous Virginia Declaration of Rights, and here for the first time, as clause nine, appeared the language taken from the English Bill of Rights: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." With the substitution of "shall not" for "ought not to be," this is the wording of the eighth amendment. Aside from the obvious inference to be drawn from the identity of language, the path from Williamsburg in 1776 to the Congress in 1789 can easily be traced. The Virginia Declaration exercised a magnetic force, and its ninth section was incorporated in the Revolutionary period constitutions of Maryland, Delaware, North Carolina, Georgia and Massachusetts. It was in Virginia, moreover, that one of the most vigorous fights developed in the struggle over ratification of the Constitution. By the time of the Virginia debate the Constitution had been ratified without qualification in six states; three others, Massachusetts, South Carolina and New Hampshire, had coupled ratification with strong recommendations for the adoption of certain amendments as a bill of rights. These did not, however, make any reference to bail. This latter procedure was adopted in Virginia, whose convention recommended a bill of rights closely following the language of their earlier Declaration of Rights, including the excessive bail clause. The subsequent ratifications by New York, North Carolina and Rhode Island included the same recommendation. When Madison rose in the House of Representatives a year later to propose the amendments which became the Bill of Rights he took the excessive bail language exactly as it had been recommended by the Virginia Convention, which in turn had taken it verbatim from the 1776 Declaration.

Va.
Dec. of Rts.
"Excessive
Bail"

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[114] As made available to the colonists in the first American edition of Blackstone, published in Philadelphia in 1772, the sentence reads:

> And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute [Bill of Rights, 1689] 1 W. & M. st. 2, c. 1. that excessive bail ought not to be required: though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine.

4 BLACKSTONE, COMMENTARIES 294 (1st Am. ed. 1772).

### *D. The Role of George Mason*

The man who wrote both the Declaration of Rights in 1776 and the amendments proposed to Congress by the Virginia ratification convention in 1788 was George Mason, one of the unsung heroes of the revolutionary era.[115] As the evidence is persuasive that the excessive bail language of the Declaration was carried forward into the Bill of Rights without further thought or analysis after it left Mason's hands, his role is one of critical importance in understanding the original objective of these few words.

There was little about Mason which would have foretold his creative genius in fashioning our constitutional law. Although educated in the library of a lawyer uncle which included a generous share of law books and although he served for many years as a lay justice for Fairfax County, he had no technical training or experience as a lawyer. He was preoccupied with raising nine young children after the death of his wife and with managing a 5,000-acre plantation just down river from Mount Vernon with 500 slaves who not only produced and shipped out tobacco and wheat but also made the plantation almost entirely self-sufficient in such matters as food, liquor, lumber, clothing and shoes. His correspondence was mostly about his immediate concerns: running the plantation, requisitioning supplies and powder for the militia, promoting the development of western land, collecting his debts or getting his debtors thrown in jail, riding to hounds or hunting deer in his private game preserve with his neighbor, George Washington, and protecting the Potomac from marauding robbers or scavenging British naval parties. Throughout his life he shunned public office, and only the most compelling circumstances could dislodge him from these local, family, and plantation responsibilities. The Virginia Convention of June, 1776, was such a circumstance, and it catapulted him into the role of chief architect of fundamental American liberties.

Mason

Two years before, in 1774, Mason had drafted the Fairfax Resolves,[116] a protest document whose influence can be seen in the Declaration and Resolves of the First Continental Congress later that year.[117] At that time, however, Mason's role was not that of rebel but of loyal British subject,[118] importuning and pleading in the great tradition which before had produced such monuments as Magna Carta, the Petition of Right delivered to Charles I and the English Bill of Rights of 1688. But when the 1776 Virginia convention met, the die for revolution had been cast—the Declaration of Independence was only four weeks away and the task was to form a new government for the Commonwealth. Mason himself noted that his draft Declaration of Rights was the first document of its kind in American history.[119] Nor had it any counterpart in England, whose great charters of liberty were either statutes like the Habeas Corpus Act with "no noble language, just down-to-earth regulations . . ." [120] or enactments like Magna Carta and the Bill of Rights, in which specific concessions were obtained from the Crown. Indeed, the form of the English Bill of Rights bears a striking resemblance to the colonial protest documents of 1774, first spelling out grievances and then reaching for solutions. Mason's outlook in 1776, however, was entirely prospective. There was no certain form of future government, no body of existing law and precedent whose incorporation could be assumed, and he described as his objective the creation of a "new government upon a broad foundation" and the provision of "the most effectual securities for the essential rights of human nature, both in civil and religious liberty." [121] The philosophy of Locke and Sidney, some of the finest creations of the 600 year struggle for liberty in England, a strong conviction of the importance of man, and an intense but practical idealism were some of the ingredients that filtered through his mind into the Declaration. It is difficult today, when much of what he wrote has become trite with familiarity, to appreciate the extent of Mason's creative innovation. This is because his selection and phrasing was borrowed by Jefferson for the Declaration of Independence, because the Virginia Declaration became the model for most subsequent state constitutions, and because many of the clauses found their way into the Bill of Rights. But anyone who puts himself into its historical context in reading Mason's Declaration is likely to agree with Jefferson's estimate of Mason as "a man of the first order of wisdom among those who acted on the theatre of the revolution, of expansive mind, profound judgment, cogent in argument, learned in the lore of our former constitution, and earnest for the republican change on democratic principles." [132]

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[115] See 1 ROWLAND, LIFE OF GEORGE MASON 234-50 (1892). A reproduction of Mason's draft is in *id.* at 240. For the material on Mason I have also drawn upon HILL, GEORGE MASON, CONSTITUTIONALIST (1938) and RUTLAND 30-40.

[116] HILL, *op. cit. supra* note 115, at 112-16.

[117] The draft of the *Resolves*, from a manuscript in Mason's handwriting, are printed in 1 ROWLAND, *op. cit. supra* note 115, at 418-27.

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[118] "8. Resolved, That it is our greatest wish and inclination, as well as interest, to continue our connexion with, and dependence upon, the British government . . . ." From the Fairfax Resolves, *id.* at 421.

[119] He may have been unfamiliar with the Massachusetts Body of Liberties of 1641, which in certain respects had a similar purpose. See HASKINS, *op. cit. supra* note 79, at 36.

[120] 2 CHAFEE, DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 13 (1963).

[121] 1 ROWLAND, *op. cit. supra* note 115, at 239.

Why, then, in a document generally so well adapted to its purpose, did Mason deal with the problem of pretrial detention in so incomplete and ambiguous a fashion? In every other operative clause of the Declaration, for example, habeas corpus, jury trial, confrontation, venue, self-incrimination, general searches, the prohibition against governmental action is clearly stated. The defect in his treatment of bail seems most likely to have arisen from Mason's failure to appreciate what I have stressed above: the tripartite nature of the English protection against abusive pretrial detention, involving procedure and the right to bail as well as control of the judicial abuse of excessive bail. This was lawyer's law, and whereas Mason was certainly familiar with the ringing language of the English Bill of Rights, the underlying fundamental bail law was buried in technical jargon. Mason himself recognized his limitations in this respect. When four years later he was appointed to serve on the committee for the revision of Virginia law, he excused himself "as, being no lawyer, he felt himself unqualified for the work." [133]

Mason not a lawyer so missed the three-part protection? (Why did he succeed elsewhere?)

Mason's mistake, if such it was, was thereafter carried forward with so little discussion that the latent ambiguity of the clause was never noticed. The only reference in the record of congressional debate on the Bill of Rights to the excessive bail clause is the following statement in the House, set out in its entirety:

> Mr. Livermore.—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? [134]

The speaker then made similarly brief objections to the vagueness of the other clauses of the amendment. This observation could have provoked the kind of debate which would have illuminated the entire question, but instead the record shows only that the amendment was then "agreed to by a considerable majority."

Mason's drafting error might also have been corrected if note had been taken of a curious occurrence in the Continental Congress in 1787. The Northwest Ordinance adopted in that year, as noted above, included a guarantee (to "forever remain unaltered unless by common consent") whose language provides an interesting contrast to the eighth amendment:

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[132] Jefferson, *Autobiography*, in 1 Writings of Thomas Jefferson 1, 56 (Ford ed. 1892).

[133] *Id.* at 59.

[134] 1 Annals of Cong. 754 (1789-91).

> Article the Second . . . . all persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great; all fines shall be moderate; and no cruel or unusual punishments shall be inflicted . . . .[125]

NW
ord.
lang.

The first clause is taken almost verbatim from the Pennsylvania law of 1682, and the rest is adapted from the second part of paragraph 10 of the English Bill of Rights but omits the opening language of that paragraph which proscribes excessive bail. The omission, then, must have been deliberate. This deduction is reinforced by the fact that the draftsman of the Ordinance was Nathan Dane of Massachusetts, who stated that he was guided "mainly, from the laws of Massachusetts." [126] The Massachusetts constitution of 1780, in turn, had incorporated verbatim the excessive bail clause of Mason's Virginia Declaration. Unlike Mason, Dane was a well trained and experienced lawyer.[127] One can only speculate that, not without reason, he may have regarded the excessive bail clause as unnecessary surplusage because the requirement that "all persons be bailable" included by necessary implication the requirement that bail be reasonable. But Dane was not a member of the first Congress, and there was no one present to correct Mason's apparent assumption that the excessive bail clause alone was sufficient to epitomize the protections evolved from the long struggle against pretrial imprisonment.

Two other factors give some support for my conclusion that the excessive bail clause was meant to provide a constitutional right to bail and that the inadequacy of the form adopted for this purpose was the result of inadvertence. The first is that bail was apparently not a point of dispute between the colonies and England immediately before the Revolution. It is not mentioned in the 1774 protest documents such as the Fairfax Resolves, the Declaration and Resolves of the First Continental Congress, or the Address to the People of Quebec. This was doubtless in part due to the development of separate American law on the subject and in part to an unchallenged assumption that the right against pretrial imprisonment existed. Chafee has noted a similar lack of contemporaneous discussion about habeas corpus, where the "importance of the writ itself is virtually taken for granted." [128] Thus many early state constitutions failed to mention habeas corpus at all. "It had been so long and solidly established in every colony that assertion was probably considered unnecessary. Contrast the urgency of including freedom of religion and speech and several other liberties which had been often impaired in colonial history." [129] Not unnaturally attention was concentrated on issues of immediate controversy; bail got carried along on a kind of automatic historical reflex.

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[125] An Ordinance for the government of the Territory of the United States North-West of the River Ohio, July 13, 1787, art. ii.

[126] RUTLAND 104.

[127] Dane graduated from Harvard College "with high honors," read law in the office of a judge in Salem, and his legal work, which included an eight volume "comprehensive compendium" of American law, "displayed not only his great legal attainments but a meticulous attention to detail and a methodical labor which was characteristic of everything he undertook." His support of Harvard Law School resulted in the Dane Professorship at that school. Knott, *Nathan Dane*, in 5 DICTIONARY OF AMERICAN BIOGRAPHY 63-64 (1930).

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Second, to construe the eighth amendment as not providing a constitutional right to bail secure against legislative abridgment flies in the face of everything we know about the purpose of the Bill of Rights as a whole. When Madison first proposed the Bill of Rights in Congress he stressed the inadequacy of the English approach in its declaration of rights:

Reason for Bill of Rts:

> In the declaration of rights which that country has established, the truth is, they have gone no farther than to raise a barrier against the power of the Crown; the power of the legislature is left altogether indefinite. . . .
>
> But although . . . it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of Government . . . .[130]

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He then went on to stress that protection against abuse

> must be levelled against the Legislative [branch], for it is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper.[131]

Ten years later, in writing about freedom of the press and the Sedition Act, Madison reiterated that whereas the English Bill of Rights was "not reared against the Parliament, but against the royal perogative, . . . in the United States the case is altogether different" in that protection against legislative abuse is also secured.[132]

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[128] 1 CHAFEE, *op. cit. supra* note 20, at 53.

[129] *Id.* at 54.

[130] 1 ANNALS OF CONG. 436 (1789-91).

[131] *Id.* at 437.

[132] 6 WRITINGS OF JAMES MADISON 386-87 (Hunt ed. 1906). Compare Bridges v. California, 314 U.S. 252, 263-68 (1941), rejecting an argument drawn from "deeply rooted" principles of the common law on the ground that this is not the standard to be applied under the first amendment and relying upon Madison's statements.

In conclusion, no direct evidence has been found as to the intent behind the ambiguous language of the excessive bail clause, but all the circumstances surrounding its adoption in the first Congress argue against giving it a narrow reading. These include the critical place of protests against abusive pretrial detention in the evolution of English liberty, the nondiscretionary character of contemporaneous English law, the colonial experience with liberalizing bail law, the contemporaneous legislation during the period of the Confederation, the circumstances surrounding the Virginia Declaration of Rights, Mason's expressed intent to provide "effectual securities for . . . essential rights," and the objective through the Bill of Rights to provide protection against legislative abuse. What the precise scope and substance of this right to bail should be under modern conditions neither can nor should be deduced from history. But however such detail may be resolved, the only end which seems consistent with these historical antecedents is that the clause was intended to afford protection against pretrial imprisonment in a broad category of cases.

## II. THE APPLICATION OF THE EIGHTH AMENDMENT

### *A. An Historical Caveat: Bail History and the Poor*

When we turn to the nature of the protection afforded by a right to bail and its application to the high proportion of indigent defendants in modern society, the potential usefulness of historical evidence sharply diminishes. We have already noted that under colonial practice in at least a few courts most defendants appeared to be released, but there are instances in which the defendants were unable to obtain release. In one case heard by Judge Pynchon in Massachusetts in July, 1674, James Browne and Benjamin Allyn were charged with burglary and theft:

> I required Both of them to become Bound in .20£ Bond a piece with .2. sufficient suertys for theire appearance at Next County Court at Springfield in September next as also for theire good Behaviour in the meane tyme. [Accordingly] Benjamin Allyn in Twenty Pounds and Israell Dewey as suerty in like sum . . . Doe acknowledge themselves Bound . . . and in case of default therein to forfeite the said sums . . . . James Browne finding noe Suertys was committed . . . till the Cort or till he shall find suerty . . .[188]

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[188] COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, *op. cit. supra* note 110, at 280-81. This case was tried and the defendants found guilty on September 29, and in a disposition typical of the cases I have found they were required to pay treble damages for the liquor stolen, to pay various costs, and "to be Branded in their Forheades for their Burglary with the letter B . . . ." *Id.* at 281. For another salty instance

It is impossible to determine whether, in the absence of professional bondsmen, the courts placed any restrictions upon allowing defendants to sign their own bonds or upon whom they would accept as sureties. Indeed, it is important to recall that few persons in the colonies would have been concerned or have even thought about the welfare of poor classes from which so large a proportion of our defendant population is drawn. In 1777 the Continental Congress, in providing in article IV of the Articles of Confederation for "free ingress and regress" of citizens among states, explicitly excluded from its operation those citizens who were "paupers." In 1788, a year before Congress was to consider what was to become the eighth amendment, Massachusetts enacted legislation which, supplemented in 1794 and 1796, provided for compulsory work in houses of correction for, *inter alia*, "all rogues, vagabonds and idle persons" and "common railers or brawlers, such as neglect their callings or employment, mispend what they earn, and do not provide for themselves for the support of their families . . ."; [184] for the expulsion of Negroes [185] and of nonresident "vagrant, strolling and poor people" who "intrude and shelter themselves . . . to the injury of the rightful inhabitants"; [186] for binding out to work for a year at a time all persons

> married or unmarried, upwards of twenty-one years of age, as are able of body, but have no visible means of support, who live idly, and use and exercise no ordinary or daily lawful trade or business to get their living by; [187]

and for the removal of paupers to their lawful settlements.[188] This legislation was widely copied by other states in the eighteenth and early nineteenth centuries.[189] As late as 1837 the United States Supreme Court noted that it is "as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against [a] physical

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of life among the Puritans see *id.* at 389-91. As for the disposition of sexual offenders see Chaffe's introduction to Records of the Suffolk County Court, *op. cit. supra* note 110, at lxxxi: "It must have been as good as a circus parade to the hard-working people to see women stripped to the waist and whipped at a cart's tail through the streets."

[184] Act of March 26, 1788, § 2, 1 Laws of Mass. 1780-1807 411 (1807).

[185] Act of March 26, 1788, § 6, 1 Laws of Mass. 1780-1807 413 (1807).

[186] Act of June 17, 1796, 2 Perpetual Laws of Mass. 1780-1800 361 (1801).

[187] Act of Feb. 26, 1794, § 6, 2 Laws of Mass. 1780-1807 619, 622 (1807).

[188] Act of Feb. 26, 1794, § 10, 2 Laws of Mass. 1780-1807 623-26 (1807).

[189] Riesenfeld, *Law-making and Legislative Precedent in American Legal History*, 33 Minn. L. Rev. 103, 105 n.9 (1949).

pestilence . . . ."[140] That historical manifestation of this attitude most directly relevant to pretrial detention is imprisonment for debt. In 1830, for example, it was estimated that in the northern and eastern states three times as many persons were imprisoned for debt as were imprisoned for crime. The number reached 50,000 a year including 7,000 in Pennsylvania, which ostensibly had abolished imprisonment for debt in 1776,[141] and of these, thirty Philadelphians were jailed for debts of less than one dollar.[142]

A similar attitude toward the poor prevailed in England as reflected in the culmination of centuries of repressive legislation which sought, *inter alia*, to keep the price of labor down by harsh vagrancy legislation[143] and centuries of "poor" laws whose operation in the eighteenth century was described by Sidney and Beatrice Webb as "callous inhumanity," "brutal demoralisation" and "heedless cruelty" with inadequate "provision for even the most innocent and deserving" of the poor and an "almost complete lack of any intelligent treatment of the infants and children, the sick and those of unsound mind."[144] One recoils at the wealth of documentation provided for this statement. For example, in 1815 eleven London parishes, in order to be spared the expense of support, took 2,026 children of poor parents from their families and shipped them out to manufacturers in the north of England.[145]

This was the context in which the law of bail developed. It is not surprising that a society unconcerned about the callous cruelty of the poor laws or the imprisonment of civil debtors also did not become excited about economic discrimination against alleged criminals. What is surprising is that it is taking so long for the changed attitude towards the poor in other contexts to percolate down to the bail system. Imprisonment for debt was substantially controlled in the nineteenth century, the Social Security Act enacted in 1933, and restrictions on interstate travel of paupers outlawed in 1941.[146] But only in recent years has the bail problem as it affects indigent defendants in the pretrial period come to the surface, and only in very recent years has it arisen in the courts.

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[140] City of New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837). This language was finally repudiated in Edwards v. California, 314 U.S. 160, 177 (1941), but not before it had been restated in numerous dicta, *e.g.*, Passenger Cases, 48 U.S. (7 How.) 282, 425 (1849).

[141] PA. CONST. § 28 (1776); PA. CONST. art. 9, § 16 (1790). See RUTLAND 47. Compare Max Radin's sarcastic observation about early state constitutional provisions which "undertake to wipe out imprisonment for debt by a single sentence." Radin, *Debt*, in 5 ENCYC. SOC. SCI. 32, 37-38 (1931). He reports that the practice continued into the 20th century. The first substantial reform legislation in England was The Debtors Act, 1869, 32 & 33 Vict. c. 62.

[142] These figures are from the NORTH AMERICAN REVIEW for April 1831, quoted in Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 29 (1926).

[143] For a history of this legislation, which stemmed from the breakup of feudalism and the economic chaos occasioned by the black death in the middle of the 14th century, see Foote, *Vagrancy-type Law and Its Administration*, 104 U. PA. L. REV. 603, 615-16 (1956).

[144] WEBB & WEBB, ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY 424 (1927).

[145] *Id.* at 203.

### B. *"Excessive Bail" in Indigent Cases*

The threshold of the problem for paupers that courts must decide is the constitutional standard which determines whether bail is excessive. Relevant case history is scanty. The first significant decision involved one Lawrence, who was taken into custody in 1835 after he had fired two loaded pistols at President Jackson in the capitol rotunda but missed. Lawrence was brought before Chief Judge Cranch, who "supposed bail in $1,000 would be sufficient, as it was not a penitentiary offense, there being no actual battery, and as he did not appear to have any property."[147] The district attorney objected that the defendant's friends might bail him out so he could try again.

> The chief judge then said that there was no evidence before him to induce a suspicion that any other person was concerned in the act; that the constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law . . . . That the discretion of the magistrate in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence. That as the prisoner had some reputable friends who might be disposed to bail him, he would require bail in the sum of $1,500. The sum, if the ability of the prisoner only were to be considered, is, probably, too large; but if the atrocity of the offence alone were considered, might seem too small . . . .[148]

The opinion is ambiguous as to whether the 1,500 dollars was designed to make it possible or impossible for Lawrence's "reputable friends" to bail him; in either event the bail issue was soon mooted when Lawrence was committed on the ground of insanity.

But at least the court recognized the impossible dilemma posed by the eighth amendment and its opinion might have launched further analysis of the problem. Instead, however, the courts retreated to double-talk and silence. Only a handful of cases since *Lawrence* even reach the question of the defendant's financial inability to raise the amount demanded. Few have seemed to follow the *Lawrence* dictum;[149] others have ignored the matter,[150] flatly stated that the inability of the accused to make bail is not grounds for relief,[151] or given the issue that summary treatment reserved for frivolous questions—or very difficult problems.[152] Still other courts have subordinated the defendant's ability to some objective standard such as the suitability of the amount as proportionate to the offense charged[153] or the ability of "the ordinary citizen in like circumstances."[154] The circular reasoning characteristic of the encyclopedists is in this instance an unfortunate accurate reflection of the barren state of the case law:

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[146] See Edwards v. California, 314 U.S. 160, 185 (1941) (concurring opinion).

[147] United States v. Lawrence, 26 Fed. Cas. 887, 888 (No. 15577) (C.C.D.C. 1835).

[148] *Id.* at 887-89.

> Bail must not be in a prohibitory amount, more than the accused can reasonably be expected under the circumstances to give, for if so it is substantially a denial of bail within the constitutional provision. However, a mere inability to procure bail in a certain amount does not of itself make such amount excessive . . . .[155]

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[149] United States v. Brawner, 7 Fed. 86 (W.D. Tenn. 1881) ($5,000 bail reduced to $2,500; defendant had testified that he had only land worth $75 and his father owned 240 acres worth $8-$10 per acre); *Ex parte* Castillo, 102 Tex. Crim. 52, 277 S.W. 126 (1925) ($3,000 bail for laboring Mexican charged with prohibition offense reduced to the $500 defendant said his friends could put up). However, in both these cases it is doubtful if the defendant's limited ability was the determinative factor. In *Brawner* the court found that "it is a rule of our courts in this district to require $2,000 in cases like this. . . ." 7 Fed. at 89, while in *Castillo* $500 may well have been closer to the local norm for prohibition offenses.

See also Harrison v. Stone, 113 Fla. 471, 152 So. 19 (1934) (court looked at the limited assets of laborer in fixing $1,000 bail in homicide case where evidence was inconclusive); State v. Alvarez, 182 La. 50, 161 So. 17 (1935) (implication that ability of accused was an important consideration in reducing $25,000 to $2,500 where there was "nothing in the evidence to show that he is in a position to furnish a bond in excess of that amount," *id.* at 54, 161 So. at 18).

[150] See, *e.g.*, United States v. Dioguardi, 237 F.2d 57 (2d Cir. 1956); *In re* Morehead, 107 Cal. App. 2d 346, 237 P.2d 335 (1951) (court did not even include resources of defendant as a factor to be considered in setting bail).

[151] See, *e.g.*, United States v. Rumrich, 180 F.2d 575, 576 (2d Cir. 1950) (per curiam) ("A person arrested upon a criminal charge, who cannot give bail, has no recourse but to move for trial."); People *ex rel.* Fraser v. Britt, 289 N.Y. 614, 43 N.E.2d 836 (1942) (mem.); see Delaney v. Shobe, 218 Ore. 626, 346 P.2d 126 (1959) (not sufficient as sole ground for reduction).

[152] See, *e.g.*, *Ex parte* Duncan, 54 Cal. 75 (1879).

[153] *Ex parte* Malley, 50 Nev. 248, 256 Pac. 512 (1927) ($100,000 bail for alleged embezzler of $500,000 affirmed, for even if it were true that defendant could afford only $25,000, this is not determinative and it must appear that bail is disproportionate to the offense charged).

[154] Mendenhall v. Sweat, 117 Fla. 659, 158 So. 280 (1934). As the court notes that the accused in the *Mendenhall* case was insolvent, *id.* at 662, 158 So. at 281, of what relevance to him could this standard be unless the court means by "like circumstances" an ordinary insolvent citizen?

[155] 6 C.J., *Bail* § 222, at 989 (1916). (Footnotes omitted.)

As to actual practice bail studies have abundantly proved that the *Lawrence* dictum is largely ignored. In the New York bail study in no observed case did a magistrate ask about the defendant's financial ability, and in two-thirds of the cases observed in the Philadelphia study no questions were asked about any of the factors said to be relevant to setting bail.[156] Indeed, the Attorney General's Poverty Committee recently noted the characteristic failure of American bail practice to establish any procedure "to provide the bail-setting authority with relevant factual data indispensable to sound bail decisions." [157]

The only other pre-1960 case worth special mention is *Stack v. Boyle*,[158] although not directly on point since the twelve Smith Act conspiracy defendants did not allege that they were indigent. Rather each objected that bail had been set in the uniform amount of 50,000 dollars for the illegitimate purpose of assuring that they would remain in jail pending trial. Apparently envisaging an individualized procedure, the Court sent the cases back "so that a hearing may be held for the purpose of fixing reasonable bail for each petitioner." [159] The Supreme Court's opinion gave constitutional sanction under the eighth amendment to the Federal Rule of Criminal Procedure 46(c) standard that the amount is to be such as to "insure the presence of the defendant" and that anything more, presumably that exacted for any other purpose, is excessive.[160] But neither the Court's opinion nor that of Mr. Justice Jackson used language calculated to advance the position of indigents.

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[156] *New York Bail Study* 709; see *Philadelphia Bail Study* 1038 & n.32.

[157] ATT'Y GEN. REP. 62.

[158] 342 U.S. 1 (1951).

[159] *Id.* at 7.

[160] This is the usual rule in state courts as well. *E.g.*, Gusick v. Boies, 72 Ariz. 233, 233 P.2d 446 (1951). Unusually high bail cannot be justified on the grounds that the defendant is vile and reprehensible, Gusick v. Boies, 72 Ariz. 309, 234 P.2d 430 (1951); or to impose punishment, Johnson v. State, 30 Ala. App. 593, 10 So. 2d 298 (1942); or because public opinion is aroused against the defendants, *In re* Stegman, 112 N.J. Eq. 72, 163 Atl. 422 (1932); or because the defendant will not cooperate with the district attorney, People *ex rel.* Ruberstein v. Warden, 279 App. Div. 47, 107 N.Y.S.2d 948 (1951); or to prevent the prisoner from being released, People *ex rel.* Sammons v. Snow, 340 Ill. 464, 173 N.E. 8 (1930) ($50,000 bail set for vagrancy and trial judge stated, "If I thought he would get out on that I would make it more," *id.* at 469, 173 N.E. at 9). See generally Annot., 72 A.L.R. 801 (1931).

Of course the distinction between the justified motive of insuring appearance and unjustified motives such as those enumerated above in practice amounts to little. The factor of insuring appearance is so vague and the discretion given the trial judge accordingly so broad, see notes 150-55 *supra*, that this issue is likely to come up only if the judge lets the cat out of the bag by explicitly verbalizing his improper motive. It should be recalled that the correlation between insuring appearance at trial and the amount of bail set is entirely unknown, and such correlation as exists presumably varies according to whether the money at stake belongs to the defendant, or his relatives, or (as is usually the case) a bondsman or bonding company.

The Court stated that the base standard to be applied is the amount "usually fixed for serious charges of crime"; if any greater amount is required "that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved."[161] On the other hand Mr. Justice Jackson noted that if the unusually high bail was set merely to keep the defendants in jail, "it is contrary to the whole policy and philosophy of bail."[162] He then added: "This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount."[163]

There seems to be implied dictum in these words that bail set in the average amount is reasonable and that individualization is required only for amounts greater than the average. This also seems to be the most plausible explanation of the earlier case law. The Court does not explicitly go as far as a very early New Hampshire case, which quoted with apparent approval Hawkins' statement that bail "ought never to be less than 40*l* for a capital crime, but may be as much higher" as the justice in his discretion sees fit.[164] Yet the effect of *Stack v. Boyle* is to leave courts free to establish such minimum scales, and the evidence is overwhelming that this is in fact what has been done.[165]

The bail "usually fixed" for serious crimes, however, is in an amount which the great majority of defendants cannot make. Thus for robbery bail of 2,500 dollars at least is probably the norm,[166] although available studies show that the following proportions of defendants could not make bail in the amounts shown:

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[161] 342 U.S. at 6.

[162] 342 U.S. at 10 (Jackson, J., concurring).

[163] *Ibid.*

[164] Evans v. Foster, 1 N.H. 374 (1819) (alternative holding) (quoting HAWKINS PLEAS OF THE CROWN that bail "ought never to be less than 40 *l* for a capital crime, but may be as much higher as the justices in discretion shall think fit to require upon consideration of the ability and quality of the prisoner and the nature of the offence." "The property and character of the respondent ought perhaps, in some instances to affect the amount of the recognizance," but bail ought to be enough to ensure appearance. (Civil action against magistrate for causing plaintiff's incarceration by demanding excessive bail which plaintiff could not make. Nonsuit affirmed.)).

[165] Mr. Justice Harlan does not tell us how he got the data used in Noto v. United States, 76 Sup. Ct. 255 (Harlan, Circuit Justice, 1955), except for his reference to "the record in the present case [and] the research of my Law Clerk," *id.* at 258 n.4. In any event, following precisely the steps outlined in the text, he found that bail for similar communist cases averaged $9000, that there were no special aggravating circumstances in Noto's case, and that accordingly $30,000 bail would be reduced to $10,000. For another application of the averaging rule see United States v. Weiss, 233 F.2d 463, 466 (7th Cir. 1956).

[166] In the list of bail amounts in Philadelphia, "Robbery . . . (b) Knife or Gun" is listed as "$2500 normal." *Philadelphia Bail Study* 12. In the District of Columbia, a similar list for "station house bail" includes the figure of $3000 for attempted robbery. FREED & WALD 19.

> (a) $1,501-$2,500, 60 percent of a sample of 286 federal defendants in four districts;[167]
>
> (b) $501-$1,500, over half of the accused, in a three year study of the Southern District in New York;[168]
>
> (c) $1,000 or more, 68 percent of a sample of Philadelphia state court defendants;[169]
>
> (d) $2,500, 63 percent of New York City state felony defendants.[170]

Those high sounding platitudes in the opinions in *Stack v. Boyle*[171] certainly take on a hollow tone when it is realized that the case apparently sanctions the very bail-setting law which has brought about such results.

What is most perplexing is why observers of the bail system lost sight of this obvious and devastating discrimination, seen so clearly early in our history. Soon after Chief Judge Cranch decided the *Lawrence* case, one of the early students of the sociology of law made the same point even more forcefully. Discussing some of the anomalies he had found in America, De Toqueville wrote:

> [N]o man can entirely shake off the influence of the past; and the settlers, intentionally or not, mingled habits and notions derived from their education and the traditions of their country with those habits and notions which were exclusively their own . . . .
>
> I shall quote a single example to illustrate my meaning. The civil and criminal procedure of the Americans has only two means of action,—committal or bail. The first act of the magistrate is to exact security from the defendant, or, in case of refusal, to incarcerate him . . . .
>
> It is evident that such a legislation is hostile to the poor, and favorable only to the rich. The poor man has not always a security to produce, even in a civil case; and if he is obliged to wait for justice in prison, he is speedily reduced to distress. . . . Nothing can be more aristocratic than this system of legislation. Yet in America, it is the poor who

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[167] Figures compiled from ATT'Y GEN. REP., Table iv at 135.

[168] *Id.* at 66-67.

[169] *Philadelphia Bail Study* 1032.

[170] *New York Bail Study* 707.

[171] For example, the Court characterized bail as the "traditional right to freedom" without which "the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, 342 U.S. 1, 4 (1951). "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." *Id.* at 7-8 (concurring opinion).

> make the law, and they usually reserve the greatest advantages of society to themselves. The explanation of the phenomenon is to be found in England; the laws of which I speak are English, and the Americans have retained them, although repugnant to the general tenor of their legislation and the mass of their ideas.[172]

But later observers of the bail system, perhaps on the philosophy that what is ordained [173] and inevitable [174] is not worth troubling about, have paid little attention to the problem. There are only scattered references in the writings on bail of Arthur Beeley,[175] Raymond Moley,[176] and Wayne Morse [177] to the impact of the system upon the poor. Even such an admirable precursor of modern empirical sociological research as the Cleveland Crime Survey of 1920-1922 directed by Dean Pound and Justice Frankfurter, was inexplicably silent on the social efficacy of the bail system as measured by the proportion of defendants who obtained pretrial freedom.[178]

One of the most disturbing manifestations of this blindness has been the preoccupation of bail reformers with attempts to clean up the graft and abuse traditionally associated with bail bondsmen. The two most common targets have been the practice whereby bondsmen reduce their cost of doing business by avoiding forfeiture in most cases of default and the fraud perpetrated against the state by bondsmen who put up fictitious collateral—what is known in the trade as straw bail. No doubt one of our social goals is to make bondsmen honest and responsible. But the fact that our bail system works at all even for a minority of defendants may be due in considerable measure to the prevalance of such loopholes and loose enforcement since there is almost inevitably a correlation between the risk and expense of the bondsman's undertaking and the proportion of defendants who achieve pretrial liberty. If this is so, there is a certain irony in taking a system which is not working well to begin with and subjecting it to a "reform" which would leave it even less able to perform its primary function of getting defendants out of jail before they have been tried.

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[172] 1 de Toqueville, Democracy in America 55-56 (Bradley ed. 1963). (Footnote omitted.) This edition is a revised translation; the book was first published in France in 1835, and an English translation appeared immediately thereafter.

[173] "The Lord maketh poor, and maketh rich: he bringeth low, and lifteth up." 1 *Samuel* 2:7.

[174] "The poor and strangers shall be always with us." Longsdorf, *Is Bail a Rich Man's Privilege?*, 7 F.R.D. 309, 311 (1948); *cf. Matthew* 26:11.

[175] Beeley, The Bail System in Chicago 59-153 (1927). While primarily concerned with the abuse of straw bail, Beeley examined 170 untried, detained defendants and, on the basis of untested assumptions about what made for reliability, concluded that "at least 65" were "dependable" and could have been released without substantial risk that they would abscond. *Id.* at 159.

[176] Moley, *Bail*, in 2 Encyc. Soc. Sci. 386, 387 (1932).

[177] Morse & Beattie, *Survey of the Administration of Criminal Justice in Oregon*, 11 Ore. L. Rev. (Supp. 1932). This study's statistics demonstrated that at each stage of the criminal proceeding—after arrest, after bind-over and after indictment—whether the defendant had bail or jail status had a significant relationship with the disposition of the case in the next stage, with those in jail receiving a substantially less favorable disposition. *Id.* at 99, 101, 106, 116-17. This finding, which appears to have been "lost" and which is not stressed or analyzed in the study itself, anticipated by some twenty-five years the statistical studies of the last decade. See note 2 *supra.*

[178] Criminal Justice in Cleveland (Pound & Frankfurter eds. 1922). Discussion of the bail system is at 154-55, 184-87, 212-13, 290-92, and 313-14. While the study does make reference to the "illogical variability in amounts [of bail] demanded," *id.* at 154, and to "looking-glass justice" in jailing a witness in a robbery case while releasing the accused robber on bond, *id.* at 314, its emphasis is all on abuses arising out of bailed cases. For a similar emphasis, see Moley, *Bail Bonds*, in The Missouri Crime Survey 189 (1926).

No doubt the insulation of appellate judges from everyday administration of the criminal law and the fact that they "are almost invariably drawn from the propertied classes and share its assumptions" [179] also have contributed to the imperceptive handling of the problem. Judge Learned Hand once made the sweeping assertion that "under our criminal procedure the accused has every advantage." [180] This is comparable to the remarks of the justices in *Stack v. Boyle* about the importance of the liberating policy behind the bail system [181] at the same time that they were apparently putting their stamp of approval on a practice which effectively thwarts that policy. The most charitable explanation for such judicial inactivity is ignorance by judges and justices about the actual administration of the bail system, which of course has kept most defendants just where it will most advantage the prosecution: behind bars.

### *C. Facing the Constitutional Question*

How to reconcile modern concern for equal legal rights for the poor with historical disinterest, which until the last decade simply read indigents as beyond the scope of constitutional protection against pretrial imprisonment, poses problems of the greatest complexity. So far, both the actual reform projects which have been noted above and the current proposals for legislative reform which will be discussed below have not necessitated facing the constitutional problem. But as the history which has been recounted indicates, the constitutional questions cannot be ignored. The whole thrust of the excessive bail clause is to ensure fair access to pretrial liberty for those entitled to it by law. Under the construction presently given to it, the eighth amendment and its historical heritage have come full circle. Originally it was designed to thwart abuse of discretion and ensure pretrial protection for the class of defendants who were the concern of reformers in the seventeenth and eighteenth centuries—political opponents of the Crown. Now it is being used to defeat those very same rights for a group—the indigents—with whom the law was unconcerned in those earlier centuries but who now represent the current major interest in law reform.

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[179] L. Hand, *Mr. Justice Holmes at Eighty-five*, in MR. JUSTICE HOLMES 119 (Frankfurter ed. 1931).

[180] United States v. Garsson, 291 Fed. 646, 649 (S.D.N.Y. 1923). Although Judge Hand did not qualify his statement, he was obviously not thinking about the bail system. For a devastating analysis of his comment in the immediate context which gave rise to it see A. M. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

[181] See note 158 *supra*.

Such discrimination against the poor cannot survive in its present blatant form. What is not clear, however, is how the impasse will be broken. One alternative would be to ignore the eighth amendment entirely, thus relegating it to historical curiosity sharing the same dusty quarters as the second amendment, and instead to forge a partial solution upon more vague and therefore more adaptable constitutional principles derived from the fifth and fourteenth amendments. If such a resolution offers release only to those indigent accused who are "good bail risks," its effect will be to grant to the lower judiciary substantial discretion to grant or deny release. Such a solution carries with it the high risk that in actual administration much of the present poverty-based discriminatory practice would simply be perpetuated under a different label.

The other possibility is to build upon the historical motivation and underlying purposes of the eighth amendment but to expand its scope to accommodate present humanitarian values. In its broadest application this second alternative would release rich and poor alike pending trial, denying altogether or very sharply restricting any judicial discretion to refuse release, at the cost of greater risks to society and the creation of administrative problems of the first magnitude.

To pose these hard core constitutional and administrative issues in their sharpest form, the next section of this article will examine an hypothetical case of an accused drawn from that substantial population of defendants who are not "good bail risks" under the present standards. Such a defendant is outside the operation of any of the current reform proposals, and it is in such a case that the United States Supreme Court will have to decide the fate of the eighth amendment.

*(To Be Concluded)*

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# THE COMING CONSTITUTIONAL CRISIS IN BAIL: II *

**CALEB FOOTE †**

In the first part of this article [182] I described the circumstances surrounding the adoption by the first Congress of the excessive bail clause of the eighth amendment and traced its antecedents in both colonial and English history. The historical evidence showed that preconstitutional protection against pretrial imprisonment rested not only on a proscription against excessive bail but, more importantly, upon statutory provisions fixing the right to bail and guaranteeing through habeas corpus an effective and speedy remedial procedure. The ambiguity of the eighth amendment was traced to the fact that the Constitution, while preserving habeas corpus and prohibiting excessive bail, failed to provide explicitly for the underlying right to bail which the other clauses served to implement. This failure was ascribed to the inadvertent draftsmanship of George Mason, and it was concluded that the only reading of the eighth amendment consistent with Mason's purpose to provide "effectual securities for . . . essential rights" reveals a right to bail secure against both legislative and judicial abridgement. While such an interpretation leaves unresolved the precise scope of the right and its possible limitation in extreme situations, the alternative is to reduce the amendment to surplusage and to disregard (1) the important role of bail as a fundamental right in the development of English liberty following Magna Carta; (2) the nondiscretionary character of contemporary English and colonial bail law; (3) the significant trends in colonial legislation which went far beyond English law in their liberality and excluded judicial discretion in determining the right to bail; and (4) the objective of the Bill of Rights to protect against congressional abuse.

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* This is the second part of Professor Foote's article, the first part of which appeared in the May issue. Footnote and subdivision numbers continue from the final footnote and subdivision numbers in Part I.

† Professor of Law and Criminology, University of California at Berkeley.

[182] Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959-99 (1965) [hereinafter cited as *Crisis in Bail: I*].

From the assumption that the eighth amendment establishes the right to bail, I proceeded to examine the constitutional standard of what constitutes "excessive" bail for indigent defendants and concluded that existing interpretations which exclude the poor from pretrial release are seriously out of step with current constitutional concern for the poor. These interpretations derived from an era which had no more regard for the rights of paupers generally than for the narrower problems posed by the indigence of many criminal defendants. This conflict between an historically derived discrimination and a growing thrust towards equal protection led to the prediction that major constitutional problems in the relationship of indigents to the bail system are in the offing, and it is to these problems that I now turn.

## III. CONSTITUTIONAL ADJUDICATION OF A BAIL CASE

The precise nature of the constitutional dilemma in bail is best illustrated by examination of an example. Accordingly I will put a hypothetical case which poses in perhaps their most difficult form the issues which must be faced in reaching a resolution of the pretrial detention problem. The hypothetical case will then be analyzed in light of our previous discussion of the extent of the constitutional right to bail and the rights of a pauper against "excessive" bail. Finally, the constitutional scheme will be contrasted with a possible alternative system of preventive pretrial detention whose operation is based on the application of standards of dangerousness applied to rich and poor alike.

### *A. The Hypothetical Case*

About 3:10 a.m. on Sunday morning a robbery occurred at an all-night service station in a large, northeastern city. The sole attendant on duty, Allen, was waiting on a customer, Williams, as the robber's car drove up and the driver got out. After Williams left and Allen went over to the robber's car, the robber suddenly lunged at him, knocking off his glasses and pressing the open blade of a small knife against his stomach. The robber forced Allen to give him 130 dollars from the cash register and, before leaving, also took two new Atlas tires and an electric lantern from displays in the station. Allen, who had very poor vision without his glasses, could only describe his assailant as a Negro of medium build and height, age about 25. Another customer, Watson, who arrived as the robber drove away, was able to describe the car as an old, dark, two-door sedan. Watson could not state the car's make and did not obtain the registration number, but he did note that it carried Virginia plates.

Late the next afternoon (Monday) an alert police officer, who had read about the foregoing facts in a police circular and who was on duty on Grand Avenue, in a lower class Negro district, noticed an old two-door black sedan with Virginia plates illegally parked on a garage lot, partially blocking the sidewalk. When he investigated he saw two very new Atlas tires mounted on the rear wheels. The officer asked the garage operator, Inman, about the car and tires. Inman stated the car belonged to a man named Daniels, who had mounted the tires himself the day before and "had acted kind of suspicious." As another man approached, Inman volunteered, "There's Daniels now." The officer called Daniels over and asked Inman, "Is this the man?" Receiving an affirmative reply, the officer questioned Daniels about his ownership of the car, his whereabouts the night of the robbery and his acquisition of the tires. He received answers he regarded as evasive and unsatisfactory, including the assertion that Daniels had possessed the tires "for about a week." When the officer noticed an electric lantern on the back shelf of the car, he took Daniels into custody. A search produced forty-two dollars in cash and a small pocket knife; a check of the tires and lantern showed them to be of the same variety as those stolen from the service station. The attendant, Allen, was unable to identify the defendant.

On Tuesday morning after a preliminary hearing defendant was ordered held for the grand jury on a charge of armed robbery and committed to jail in default of 2,500 dollars bail. On Thursday a white man, Williams, came to the police station and identified himself as one of the customers who had been in the service station at 3:10 a.m. on Sunday. He said he had just learned of the robbery, that he had had a good look at the robber when he drove up as the attendant was servicing his car and that he thought he could identify him. The police obtained an order enabling them to get defendant from the county jail in order to parade him in a line-up at which Williams picked him out as the man he had seen at the service station.

On the following Monday the defendant Daniels was interviewed by an attorney from Legal Aid. Defendant complained that he had asked to see a Legal Aid lawyer repeatedly over the past week, but the lawyer explained that Legal Aid did not have the staff to represent all defendants at preliminary hearing and that this was the first opportunity they had had to see him. In response to the lawyer's inquiry about how he was being treated, defendant complained bitterly about "lousy" food, being locked in a cell eighteen hours a day, and having been given a "going over" by the police for an hour the previous Thursday. He explained that he had been taken from the jail and put in a line-up, after which "three or four of them" had questioned him for about an hour. He said that they had been trying to get a confession but that he "knew his rights" and refused to talk. He also said that he was not physically abused.

At the lawyer's request defendant briefly described his background, stating that he was twenty-six years old and had been born and raised in Virginia, where his parents rented a small farm. He admitted that he had previously been convicted once each for vagrancy, drunkenness, disorderly conduct, theft and assault, and had served two short jail sentences. He had left Virginia in his car about a year ago, had stayed in several other cities where he had had occasional jobs and in one of which he had served one of his sentences, and had arrived in this city three weeks ago. After staying a few days with a sister who had come here a few years ago and whom he hadn't seen for years, he had moved to a rooming house. He had obtained several days' work as a day laborer and on the day of his arrest had found a job at a car wash and was just returning from his first day's work when he was apprehended. His only assets were his clothing, a cheap radio in his room, and the money and car which the police had confiscated. Asked about the electric lantern, he explained that he had purchased it in Cincinnati three months previously.

On the Saturday before the robbery he said he was dead broke and tried to borrow ten dollars from his sister, who didn't have it to lend him. That afternoon he had been with a fellow whom he knew only as Joe; they had gotten into a crap game with a group of other men he did not know but some of whom he could probably find; luck was with him and he had won over one hundred dollars. Early in the evening he visited his sister and gave her thirty dollars from his winnings. Around 11:00 Saturday night he was in a Grand Avenue tavern and met a girl he could identify only as Jo Ann but whom he would certainly know if he saw her again. About midnight he went with Jo Ann to her room nearby; by that time he was quite drunk, but he knew generally, within a block or two, where the room was. He was with Jo Ann until midmorning on Sunday and when he left, went to get his car, only to find he had two flat tires. The tires were so old as to be hardly worth repair, and while he was contemplating his predicament a man whom he had seen before and whose name might be Charlie approached him and asked him if he would like to buy two new tires cheap. Defendant purchased two Atlas tires from Charlie for fifteen dollars, asking no questions as to how Charlie had obtained them. He stated that the reason he had lied to the officer about how long he had had the tires was because he suspected there might be something fishy about the transaction. Defendant described Charlie as a Negro, age about twenty-five to thirty, about five feet ten and 170 pounds, with a small moustache. He then went to the garage operated by Inman, whom he knew slightly, and borrowed the necessary tools to mount the tires. He said he was mad at Inman for getting him into trouble by identifying him to the arresting officer and by what Inman had told the officer. "If he'd kept his mouth shut, I wouldn't be here."

The attorney was sufficiently impressed by the defendant's demeanor and possible innocence to make special arrangements to have a Legal Aid investigator sent immediately to the Grand Avenue neighborhood where defendant lived to try to check out his story. The investigator reported that he had found defendant's sister, who was unmarried, pregnant and had two small children; she was living on welfare and unable to help defendant financially; she confirmed that defendant had first tried to borrow money from her on Saturday and later, "about ten" that evening, had given her thirty dollars. He verified defendant's rooming house and his employment at the car wash, where someone else had been hired to replace him after he failed to show for work on two successive days. He also located Inman's garage and confirmed the account of the tire-mounting episode on Sunday, but he was unable to find any trace of Joe, Jo Ann or Charlie. When later informed of this last fact by the attorney, defendant exclaimed: "Those people won't talk to you, man. Get me out of here and I'll find them."

### *B. A Note on Strategy*

The hypothetical defendant is typical of the many urban accused who are bad bail risks by any of the orthodox standards. He has no money, no ties to the community, no respectable local relatives, and a prior criminal record. He represents the cases which are not likely to be helped by reforms such as the Vera Foundation's Manhattan Bail Project, which deal in relatively good risks.[183] But his story also illustrates the fact that such a person may not be guilty of the particular crime with which he is charged. His defense at trial will have to turn on his own credibility and his ability to produce alibi witnesses. The case thus poses three major problems of bail in indigent cases: pretrial punishment of a defendant who may not be guilty, the possibly critical importance in the trial of a close case of any contamination of the adjudicatory process which may result from a defendant's jail status, and special circumstances which may impair the right to prepare a defense.

The threshold problem for counsel for the hypothetical defendant is to determine what procedure can be employed for immediate relief from pretrial detention. A combination of factual circumstances and rules of procedure has made it very difficult to obtain effective review of alleged excessive bail. Counsel could use the state courts to attack the bail amount by habeas corpus or motion, alleging that any financial demand upon an indigent constitutes constitutionally excessive bail. This immediately brings one up against rules created to insulate the original determination of the amount of bail from attack. A so-called presumption against interfering with the discretion of the court originally setting bail[184] requires the defendant to assume the burden of showing a flagrant abuse which shocks the court,[185] and some courts even examine the amount of bail in the context of a further presumption that for this purpose the defendant is assumed to be guilty.[186] In one case where an appellate judge thought that bail in half the amount set would have been sufficient to secure the defendant's appearance, it was held that the lower court's action was not sufficiently arbitrary or capricious to warrant relief.[187] These rules, coupled with the factors of time, poverty, obstacles to obtaining an original setting of bail.[188] and the uncertainty of being able to obtain actual release even if a bail reduction case is won on appeal [189] probably account for the fact that about half the American jurisdictions have no reported cases dealing with allegedly excessive bail. Of course many bail reduction cases are unreported, but the inference is strong that present procedures for obtaining relief from an original determination of allegedly excessive bail are grossly inadequate.

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[183] *Crisis in Bail: I*, at 961. In Short v. United States, 344 F.2d 549 (D.C. Cir. 1965) (per curiam), bail was denied pending appeal. Short's record was more favorable for release than that of the hypothetical defendant—for example, he would "reside with relatives in the District of Columbia and he will be employed by a former employer." *Id.* at 550. (Bazelon, C.J., dissenting). But pending trial The District of Columbia Bail Project, similar to the Vera Manhattan Bail Project, "which has been of great help to our courts in such matters, looked into the matter of his possible release on personal recognizance . . . and found he did not qualify for such release under the criteria of the Project." *Id.* at 550. (Fahy, J., concurring).

[184] See, *e.g.*, Gusick v. Boies, 72 Ariz. 233, 233 P.2d 446 (1951). For an extreme case see State v. Kjelstad, 230 Wis. 579, 284 N.W. 554 (1939), where after original release on $1,500 bail defendant was rearrested on motion of the district attorney, and bail was increased to $5,000. In the supreme court the district attorney sought to uphold the increase by arguing that it was designed to protect defendant from mob violence. The court said this would constitute an improper basis for detention but that, as the argument did not appear in the record, relief would be denied because of the presumption that the court below had proper reasons.

[185] *Ex parte* Morehead, 107 Cal. App. 2d 346, 237 P.2d 335 (1951) (must appear per se that amount fixed clearly disproportionate); *Ex parte* Duncan, 53 Cal. 410 (1879) (amount must "shock the common sense"); Reid v. Perkerson, 207 Ga. 27, 60 S.E.2d 151 (1950) (must be flagrant); Delaney v. Shobe, 218 Ore. 626, 346 P.2d 126 (1959) (must show clear abuse). Compare Noto v. United States, 76 Sup. Ct. 255, 257 (Harlan, Circuit Justice, 1955) ("Ordinarily I would be unwilling to disturb the action of the two courts below in a matter of this kind"); Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964) (in federal habeas corpus proceeding, amount set in state court must be shown to be "beyond the range within which judgments could rationally differ . . .").

The state court system, moreover, is almost certain to be relatively unsympathetic to novel federal constitutional claims, and access to a federal forum is of great importance. But if we are dealing with a typical jurisdiction, jail cases are expedited on the calendar and within thirty to fifty days of arrest the defendant will be brought to trial, thereby mooting pretrial procedures for relief. This time squeeze is almost certain to prevent exhaustion of the state appellate system in time to obtain review in the United States Supreme Court.[190]

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[186] *Ex parte* Ryan, 44 Cal. 555 (1872) (assuming defendant is guilty, is bail too high?); *Ex parte* Malley, 50 Nev. 248, 256 Pac. 512 (1927); *Ex parte* McWhorter, 48 Okla. Crim. 397, 292 Pac. 393 (1930). *But see* Gusick v. Boies, 72 Ariz. 233, 233 P.2d 446 (1951) (presumed innocent).

[187] Braden v. Lady, 276 S.W.2d 664 (Ky. 1955) (bail pending appeal). Fifteen months after reduction was refused Braden's conviction was reversed and the indictment dismissed, Braden v. Commonwealth, 291 S.W.2d 843 (Ky. 1956).

[188] See, *e.g.*, Foote, Markle & Wooley, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031, 1032-43 (1954) [hereinafter cited as *Philadelphia Bail Study*]; Note, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693, 699-703 (1958) [hereinafter cited as *New York Bail Study*]. In *Ex parte* Stegman, 112 N.J. Eq. 72, 83, 163 Atl. 422, 427 (1932), the court found "as a fact" that bail had been refused because "the quarter sessions was co-operating with the prosecutor . . . to hold petitioners in confinement in order to obtain confessions by oppressive means . . . ."

[189] A defendant held in $5,000 bail who succeeded in getting a very substantial reduction to $1,500 would only moderately improve his statistical chances of being able to make bail. See, *e.g.*, *Philadelphia Bail Study* 1032-43; *New York Bail Study* 707 (giving figures for the proportion of New York defendants able to make bail at varying amounts, for example, 25% at $5,000 and 55% at $1,500).

Moreover, a defendant who obtains his freedom by having his bail reduced on appeal is still subject to possible harassment. For a flagrant example, compare the two opinions in Gusick v. Boies, 72 Ariz. 233, 233 P.2d 446 (1951), and 72 Ariz. 309, 234 P.2d 430 (1951) (after getting appellate relief, defendant was rearrested twice as prosecutor added new counts to indictment on which additional bail was demanded).

[190] This conclusion assumes that a state order denying bail is a final state judgment for the purpose of review by the Supreme Court. 28 U.S.C. § 1257 (1958). See, *e.g.*, Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963), which suggests that a state bail denial would be final, but that it has not been explicitly so held. For an analysis of *Mercantile Nat'l Bank* and other recent cases see Amsterdam, The Defensive Transfer of Civil Rights Litigation From State to Federal Courts 339-42 & n.189 (1965). Compare Stack v. Boyle, 342 U.S. 1 (1951) (federal district court denial of bail "final" for purpose of review under 28 U.S.C. § 1291 (1958)).

An alternative tactic, and one that would have to be resorted to if processes of judicial review could not be exhausted before trial was had, would be to raise the bail issue on appeal from conviction. This tactic would probably succeed, for where federal constitutional issues are at stake the defendant would probably not be barred by a holding that the only remedy for excessive bail was by pretrial motion and that the issue might not be grounds for reversal on appeal after conviction.[191] The most obvious defect of the tactic is that the delay in obtaining an adjudication of the detention issue would deny the hypothetical defendant any relief at all should he in fact not be convicted at his trial. While the cynical might argue that for practical purposes nonconviction and avoidance of a possibly long prison sentence is remedy enough, it is precisely the case where the defendant is ultimately not convicted in which pretrial punishment by detention is most offensive to our concept of justice. Such cases are not rare—for example, twenty-seven per cent of a recent sample of jailed New York City felony defendants were not convicted [192]—and point up the urgent need of procedures which will resolve detention issues before trial and before irreparable harm has been done.

In the hypothetical defendant's case, moreover, tactical considerations suggest that the only effective relief is a speedy, pretrial remedy. If he is detained, not permitted to search for his alibi witnesses and then convicted, how is he to show after his trial that he has been prejudiced by the detention? If in fact he is innocent of the robbery, he will continue because of his imprisonment to be unable to prove it. Even if he were released at some later date to search for Joe, Jo Ann and Charlie, passage of time is likely to have speedily erased all trace of them. The best and probably only way to find out whether or not the defendant is being prejudiced by detention in preparing a defense is to release him immediately and see, for example, if he can produce those witnesses whom he claims he alone can locate.

Recent developments in civil rights litigation may have laid the groundwork for a method whereby a prompt pretrial adjudication of the constitutional bail issues can be obtained in a federal court. In both *In re Shuttlesworth*[193] and *Dresner v. Stoutamire*[194] civil rights defendants faced the prospect of having to serve jail sentences while pursuing state remedies after conviction since the state denied bail pending appeal. The defendants then applied for federal habeas corpus. In *Shuttlesworth* the Supreme Court ordered the federal district court

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[191] *E.g.*, State v. Petrucelli, 37 N.J. Super. 1, 116 A.2d 721 (Super. Ct. 1955). *But see* State v. Teeter, 65 Nev. 584, 609, 200 P.2d 657, 670 (1948) (possible alternative holding: improper denial of discretionary bail "substantially affect[s] the validity of the judgment" in murder case).

Compare Timmons v. United States, 343 F.2d 310, 311 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., concurring): "Because the issue [of pretrial detention as an interference with preparation for trial and consultation with counsel] has been raised for the first time on appeal, it is not possible to assess the prejudice which appellant may have suffered."

[192] Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641, 642 Table 1 (1964) [hereinafter cited as Rankin]. Compare *New York Bail Study* 727 (20% of much smaller sample not guilty); *Philadelphia Bail Study* 1052 (18% of sample of 340 jail cases not convicted).

> . . . to hold the matter while petitioner pursues his state remedies . . . including an application for bail to state courts pending disposition of petitioner's application for state relief. In the event of failure to secure such relief, or to secure admission to bail pending such relief within five (5) days from the date of application for bail, . . . [the district court] may then consider all state remedies exhausted and proceed to hear and determine the cause, including any application for bail pending that court's final disposition of the matter.[195]

In *Dresner* the state court was given only three days to afford release on "nominal bail."[196]

The bail situation is sufficiently analogous for the same procedure to be available. The civil rights defendants in the absence of extraordinary federal relief would have had to serve their sentences, thereby suffering the punishment alleged to be unconstitutional and mooting any adjudication of constitutional claims. In the bail situation a substantial proportion of defendants jailed pending trial are sentenced upon conviction to time already served or are given credit for that time against a longer sentence.[197] Realistically, therefore, for most defendants time in detention constitutes anticipatory service of all or part of a punishment formally imposed at a later date. Insofar as *Shuttlesworth* and *Dresner* rest on the prevention of imposition of punishment pending adjudication of constitutional objections, therefore, the analogy of the bail cases is very close. To the extent that the reasoning of those civil rights cases is to prevent mootness, the bail situation presents a somewhat different case. If Shuttlesworth had finished service of his sentence before his appeal had been adjudicated, his case would have been irrevocably moot; but if a defendant is forced to trial without pretrial liberty, is then convicted and sentenced to further imprisonment, his constitutional bail claims could still be raised on appeal. This distinction, however, should not be dispositive for three reasons. First, if the bail defendant is convicted, and should win his bail question on appeal, we have noted that relief may come too late to be helpful if he can no longer locate his missing witnesses. In that event the court would have to face the unpleasant choice of allowing a retrial after unconstitutional deprivation of pretrial liberty has already done irreparable damage or of freeing the defendant outright. Second, it is much more difficult to estimate the degree of prejudice suffered by the defendant if the issue is to be determined only on appeal after conviction. Third, if the defendant is not convicted, his constitutional claims will have been mooted in precisely the same manner as in *Shuttlesworth* and he will have served allegedly unconstitutional anticipatory punishment which has proven to be unjustified without any opportunity for adjudication of his claims. These considerations suggest why the federal courts should and probably would follow the *Shuttlesworth* precedent in bail cases.

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[193] 369 U.S. 35 (1962) (per curiam).

[194] No. 21802, 5th Cir., Aug. 5, 1964.

[195] 369 U.S. 35 (1962) (per curiam).

[196] For an illuminating discussion of this strategy see AMSTERDAM, *op. cit. supra* note 190, at 281-84.

[197] See discussion *id.* at 324-25. In a sample of 958 jail cases examined in the *Philadelphia Bail Study* 1049 n.72, 472 defendants were sentenced to further imprisonment with credit for time served before trial and 90 were released after being convicted and sentenced to time served awaiting trial.

This important development in federal habeas corpus jurisdiction should for the first time open an effective procedure for testing constitutional issues in bail cases. Counsel could file simultaneous petitions in the appropriate state and federal courts, alleging that if the petitioner is not released forthwith on his own recognizance he will continue to be deprived of specified constitutional rights. The federal petition, citing *Shuttlesworth* and *Dresner*, would ask the court to take jurisdiction unless immediate relief was forthcoming in the state proceeding. If counsel is adequately prepared,[198] legal developments in civil rights cases have shown that very speedy adjudication in the federal system is possible even if it is necessary to go to the court of appeals or the Supreme Court.

### *C. Constitutional Issues for Decision*

Under existing bail law the hypothetical defendant has little chance of prevailing in his effort to achieve immediate release without financial security. As we have seen, by the federal rule of *Stack v. Boyle*,[199] which is generally applied in the states as well, bail in an amount usually fixed for the crime charged is not deemed excessive; individualized standards for bail setting, for example, Federal Rule of Criminal Procedure 46, apparently do not apply, and in practice are not applied, where bail has been set in such an average amount.[200] The hypothetical

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[198] See the discussion in AMSTERDAM, *op. cit. supra* note 190, at 324-25.

[199] 342 U.S. 1 (1951); see *Crisis in Bail: I*, at 994-96.

[200] See *id.* at 995 nn.165-66.

"In Los Angeles in the Superior Court we have a bail schedule. Let us take just one example, assault with a deadly weapon. Slight injuries, $500; slight injuries defendant is held in 2,500 dollars bail on a charge of armed robbery, and counsel's investigation would speedily disclose that this amount is not beyond the average range for so serious a charge.

Reliance will have to be placed, therefore, on hints in very recent cases[201] that *Stack v. Boyle* may not be the last word as far as indigents are concerned; on theories of due process which, although frequently applied, have never been invoked in the bail field; and on an attempt to tie together eighth amendment and equal protection theories which explicitly invite the courts to create new law notwithstanding strong historical tradition to the contrary. While there is inevitable overlapping among the claims relevant to the hypothetical defendant's case, it is helpful for purposes of analysis to state each separately.

1. He is being denied the fundamental fairness guaranteed by the due process of law because, although he alleges he is innocent, he is being punished by imprisonment before he has been tried.

2. He is being denied procedural due process because detention adversely affects the disposition of his case and thereby deprives him of a fair trial.

3. He is denied equal protection of the law because, solely on account of his poverty, he is being denied pretrial liberty.

4. His right to bail under the eighth and fourteenth amendments is being violated because the proscription against "excessive" bail must be construed in such a way as not automatically to foreclose for indigents the fundamental right to freedom pending trial.

Two threads run through all of these allegations. First are the underlying values of a democratic administration of justice which make up due process of law. Kadish has described them in this way:

> The various procedural safeguards traditionally demanded in the name of due process appear to be directed to two objectives. One is the goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished. It is not of crucial importance whether the individual tried is in fact guilty or innocent, but it is of crucial concern that the integrity of the process of ascertaining guilt or innocence never be impaired. . . .
>
> The second objective . . . traditionally deemed a part of the due process of law is more elusive and subtle. But its

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with prior felony, $1,000; serious injuries, $2,000; serious injuries with prior felony, $3,000." Proceedings, National Conference on Bail and Criminal Justice 198 (1965) [hereinafter cited as National Bail Conference] (statement of Judge Joseph A. Wapner, presiding judge, Superior Court, Los Angeles).

[201] See notes 268, 284-85 *infra*.

> vitality is manifest in a number of requirements not fully explicable in terms of the first objective. . . . Central to these requirements is the notion of man's dignity, which is denigrated equally by procedures that fail to respect his intrinsic privacy or that . . . exhibit a disdain for the value of the human personality . . . .[202]

When applied to an analysis of the bail system, these central due process values are infused with the ideals which cluster around the concept of equal justice. Pretrial detention may be regarded, in all or at least in some instances, as an infringement of the minimum essentials of a fair trial because it prejudices the disposition of the detainee's case. It may be categorized as an unjustifiable invasion of individual privacy and dignity because it imposes the punishment of imprisonment before final determination of guilt. As the application of these values of fairness and privacy necessarily involves drawing along a continuum an inevitably arbitrary line dividing the constitutionally permissible from the impermissible, the purpose of the detention becomes an important factor to be considered in determining the precise locus of division. If the only reason for detention is that the defendant is poor, as would be true in the case of an indisputably good bail risk, a very slight showing of prejudice or invasion of privacy should be sufficient to tip the constitutional scales.

The second thread connecting the hypothetical defendant's various allegations relates to the purpose of his detention. His claim that he is being discriminated against solely on account of his poverty may be his strongest appeal to our sympathy, but it is also the weakest link in his argument. The state's reply is a simple one: the 2,500 dollars bond is not intended to discriminate against the poor but to give the state some security that all defendants will appear for trial. We will have to return to the problem this reply presents below; it is sufficient here to note that the question of intention is seldom an easy one. It is rare that a stated objective is so patently false that the mask can immediately be torn away to reveal an underlying illicit purpose.[203] It is rare, too, that one can meet the burden of proof required to show that a statutory policy fair on its face is actually discriminatory in its application.[204] Clearly the state has a strong and legitimate interest in compelling appearance at trial or after final disposition of an appeal.

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[202] Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346-47 (1957).

[203] *E.g.*, Guinn v. United States, 238 U.S. 237 (1915) (Oklahoma "grandfather clause" invalidated under fifteenth amendment even though by its terms it made no discrimination on racial grounds).

[204] One case in which a statute fair on its face was held arbitrarily applied is Yick Wo v. Hopkins, 118 U.S. 365 (1886) (ordinance regulating laundries in wooden buildings systematically administered so as to discriminate against Chinese but not Caucasian laundries).

It is far from clear, however, that bail in its predominate modern form—commercial bonding—bears any significant relationship to this legitimate state interest. As Judge J. Skelly Wright of the District of Columbia recently put it,

> . . . bail has become a barnacle on the back of the criminal law. Theoretically a defendant out on bond is in the custody of his bondsman. Thus the bondsman is allowed to charge a modest fee, ten per cent of the bond, for the service he renders and the risk he runs. Actually a defendant on bond is in the custody of no one and the police and the FBI are much more familiar with his whereabouts than his bondsman. Moreover, if the defendant fails to appear for trial, it is the FBI or the police who pick him up—yet the bondsman gets the fee. In short, the bondsman gets paid for rendering no real service . . . .[205]

Or, to look at the other side of the coin, the indigent defendant is jailed for inability to put up the fee for the purchase of something which renders no service to the state.

### *D. Problems of Due Process*

#### 1. Prejudice From Pretrial Detention

The hypothetical defendant's due process claims involve two quite different kinds of prejudice. The first is unrelated to fair trial or the method of adjudicating guilt or innocence. It turns instead on the second limb of Kadish's analysis: the "notion of man's dignity" and "the value of the human personality."[206] That punishment by imprisonment prior to conviction is an evil to be tolerated, if at all, only because of compelling social necessity needs no elaboration. We have noted that probably at least one-quarter of the total pretrial jail population is never convicted.[207] As there is no question that such a statistic represents a prejudicial invasion of human values, the only problem is how much to weigh it against the supposed necessity that has produced it. Nor is the prejudice limited to those who are never convicted. Among the entire population subjected to pretrial detention—and their relatives and friends—the felt injustice of punishment without a finding of guilt cannot but impair that confidence in the law's fairness which must be the touchstone of a jurisprudence dedicated to respect for human dignity. The only plausible explanation for the gross undervaluation of this shocking result of the bail system in the due process market place of competing values is that the population which is prejudiced is stigmatized by accusation of crime and rendered powerless and voiceless by poverty.

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[205] Wright, *Criminal Law and the Bill of Rights*, The Reporter, June 3, 1965, p. 23. See also Judge Wright's concurring opinion in Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963).

[206] Kadish, *supra* note 202, at 347.

[207] *E.g.*, Rankin 642 (27% of sample of 358 jailed defendants were not convicted); *Philadelphia Bail Study* 1052, Table 1 (depending on offense, proportion of jailed defendants not convicted ranged from 7% to 27%); *New York Bail Study* 726-27.

The second type of prejudice which contemporary bail law imposes on the poor is the adverse effect on the guilt-determining and punishment-setting process through which the unbailed indigent defendant must pass. It is helpful to distinguish three kinds of infection which can sap the vitality of the trial: (a) special circumstances which, when they exist, may prejudice the particular defendant concerned; (b) pretrial detention conditions which themselves pollute the impartiality of the trial process but which could be corrected through general reforms; (c) inevitable concomitants of detention which corrupt the fairness of the trial afforded detained as compared with bailed defendants. All three of these kinds of trial prejudice are involved in the hypothetical defendant's case.

In some respects this three-part classification parallels the sources of prejudice examined in the right to counsel controversy. The first suggests the rule of *Betts v. Brady;*[208] the second, the ways in which, without affording counsel, it was maintained that a trial could be nonetheless made fair as, for example, through the protective role of the trial judge;[209] and the last, the presumption of prejudice from want of counsel which finally produced *Gideon v. Wainwright.*[210] Indeed, the problems of bail and of counsel for indigents present some striking similarities. In the initial stages of each development, logic, analysis and policy were all subordinated to the amorphous but pervasive force of a conditioned historical reflex. Once a breach was made in the wall of historical tradition in the counsel cases, the ultimate ascendency of fairness over history was assured; in retrospect one only wonders why it took us so long to act upon the obvious proposition that fairness in criminal defense requires the assistance of counsel. It will be interesting to see whether the development of bail law will again subject us to a gloomy interregnum of the kind that prevailed between *Betts* and *Gideon*.

### a. Factors of "Special" Prejudice

The hypothetical defendant is set apart from the mainstream of the detained in at least three respects. Where the majority of criminal cases pose only an issue of treatment of a concededly guilty defendant, there is at least some doubt about the hypothetical defendant's guilt, and in close cases any possible prejudice resulting from detention status therefore takes on added significance. Moreover, unlike most of that minority of cases in which there is a disputed issue of fact, here possible verification of the defendant's version of the facts poses particular investigative problems for whose resolution the accused himself is uniquely qualified. Finally, this defendant, because of the lineup and post-hearing interrogation, was subjected to interference with his qualified right to be left alone which went beyond anything required to keep him in secure custody pending trial.

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[208] 316 U.S. 455 (1942).

[209] See, *e.g.*, Gibbs v. Burke, 337 U.S. 773, 781 (1949): ". . . [T]he fair conduct of a trial depends largely on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial. . . . He may guide a defendant without a lawyer past the errors that make trials unfair."

[210] 372 U.S. 335 (1963).

Any one of these deviations from the mean of normal pretrial indigent detention may provide the necessary ingredient for a meritorious claim based on the first limb of Kadish's due process model; and in each instance the claim can be seasoned by the fact that except for the defendant's indigency he would have been exempted from having to take on that added risk.

The defendant's alibi sounds improbable but it cannot be entirely discounted. The fact that those parts of his statement which the investigator could check out were truthful gives some support to his credibility. Perhaps most significant, we know that while he tried to borrow ten dollars from his sister on Saturday morning, by that evening—before the time of the robbery—he had acquired enough assets to make her a gift of thirty dollars. In contrast, two of the strongest links in the prosecution's evidence—the similarity of his car to the one described at the scene of the robbery and the identification of the defendant by the white customer, Williams—need to be viewed with some scepticism. The first is damaging but far from conclusive in these days of northward Negro migration, when the presence in Negro sections of northeastern cities of "old, dark" cars with Virginia plates is not uncommon. As for the identification, one needs to recall the experience drawn from studies of cases in which persons were convicted of crimes of which they were later proved innocent:

> Perhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions. In many such a case the witness lied, sometimes at the prompting or with the knowledge of the police or the prosecutor. More often, however, the witness made an honest error.[211]

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[211] FRANK & FRANK, NOT GUILTY 61 (1957). In most of the cases discussed there were identification mistakes. See also BORCHARD, CONVICTING THE INNOCENT (1932); HALE, HANGED IN ERROR 45, 76, 115-16 (1961); PAGET & SILVERMAN, HANGED—AND INNOCENT? (1953).

If lineup identification evidence is unreliable at best, moreover, it is least reliable when it requires a white witness to distinguish one Negro from another.[212]

Because the tendency of any system of criminal justice is to bury its own mistakes, we have no way of estimating the incidence of erroneous identifications which result in unjust convictions. There is cause for uneasiness, however, when one considers those cases in which a mistake has been established. They are characterized not only by the resistance of officialdom to any admission of error but also by the fortuitous character of the events which led to exoneration.[213] The actual criminal may have been later arrested for another crime under circumstances which happened to instigate a reopening of the earlier case, the conscience of some public official or the curiosity of a newspaper reporter may keep a case alive despite the finality of conviction, or in very rare instances the unjustly convicted person himself may after release devote his remaining years and resources to the search for vindiction.[214] The fact that it takes such a combination of luck, concern and resources to correct a mistake long after the fact suggests that the ratio of undiscovered to discovered error may be far higher than we would like to imagine.

One of the most damaging facts implicating the hypothetical defendant is also the most elusive: the apparent general worthlessness of the defendant as a person. To establish his alibi he will have to take the stand himself and through cross-examination to test his credibility his life will become an open book. It would not be surprising if a jury reacted to him as did a former British Home Secretary in commenting upon the case of an innocent person hanged for murder:

> If Galley was wrongfully convicted, he certainly assisted very much in his own conviction by the irregular and improper life he led. . . . It is something like contributory negligence on his part.[215]

But since we are concerned only with whether this man perpetrated this particular robbery, the search for truth is elusive and in constant danger of contamination from damaging but irrelevant factors. Under these circumstances pretrial detention itself may be a significant source of such contamination. The hypothetical defendant must appear before the jury in custody and thereby be typed as one not to be trusted; his testimony reveals him as a parasite, yet but for his detention he would be holding down his job at the car wash.

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[212] Empirical studies done under the auspices of the Institute of Legal Research, University of Pennsylvania Law School, as yet unpublished, indicate that white subjects perform significantly more poorly in the identification of Negroes than they do in the identification of whites.

[213] *E.g.*, FRANK & FRANK, NOT GUILTY 74-78 (1957).

[214] See, *e.g.*, *id.* at 74-78 (the case of Clifford T. Shepard).

[215] Robert Lowe, as quoted by HALE, HANGED IN ERROR 119 (1961).

A second but related form of prejudice posed in the hypothetical case which might provide the foundation for a due process claim arises from the nature of the evidence needed to corroborate defendant's alibi. If the alibi witnesses are to be located, it would appear that the defendant needs the opportunity for self-help. Any indigent defendant will lack the resources to finance a pretrial investigation by others and it is a melancholy fact of the administration of our legal aid offices that investigatory services are normally not provided. While the problem is being attacked in the federal system, at the time of the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice in 1963 a "fundamental deficiency" was the "failure of the practices prevailing in all the district courts outside the District of Columbia to provide assigned counsel with resources" for investigation.[216]

> It is not possible to determine the percentage of cases in which these deficiencies reach serious proportions. It is clear, however, that the impact on the individual defendant is devastating when it does occur . . . .[217]

Another report states that in not more than eighteen out of 184 defender organizations are full time investigators on the payroll; indeed, in many there was not even a full time lawyer.[218]

Even where, as stipulated in the hypothetical case, the defense afforded indigents includes some facilities for pretrial investigation, an indigent defendant may suffer substantial prejudice if he is incarcerated. In part this would depend upon the time, resourcefulness and interest of the investigator, who is probably attached to a public or voluntary defender office which may have a tendency to become mechanical when harassed by large case loads. More important, it will also turn on the type of evidence which is needed. The Attorney General's Committee was informed "by experienced defense counsel that in some cases it is only the accused who can locate and induce reluctant witnesses to come forward." [219] Where racial or class differences isolate a subculture, the type of situation reported from New Haven may apply:

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[216] Att'y Gen. Comm. on Poverty and the Administration of Federal Criminal Justice, Report 26 (1963) [hereinafter cited as Att'y Gen. Rep.].

[217] *Ibid.*

[218] Taebach, The Rationing of Justice: Constitutional Rights and the Criminal Process 209 (1964).

[219] Att'y Gen. Rep. 71.

> Student directors of the Yale Law School Public Defender Association report that Negroes are most reluctant to talk to white people regarding any criminal matter. They have found it impossible to locate Negro witnesses that the accused could probably find within a short period of time if permitted to search for them.[220]

Social workers and others doing investigative work in Negro slum areas would probably substantiate the existence of this problem, which would be particularly acute in this case where one of those sought (Charlie) would be a prime suspect himself were defendant's story true.

The traditional approach of the courts, by which this problem is reached only at trial or on appeal after conviction, has severe limitations. In one case the trial court recessed for half a day to permit the previously jailed defendant, accompanied by two detectives, to search for a missing witness whom his legal aid counsel had been unable to locate.[221] How adequate this device might prove to be in our hypothetical case is a matter for speculation. One would suppose that a search limited in time by a defendant with two (white?) detectives at his elbow might be substantially less fruitful than to permit him to circulate at his leisure in the neighborhood and at its bars. Another court summarily rejected a similar claim of prejudice due to the jailed defendant's inability to search for an alibi witness.[222] In an opinion that perhaps represents the ultimate in the isolation of an appellate court from reality it was held sufficient for the defendant to be advised "of the subpoena power available to him and that the Federal Bureau of Investigation could be asked to locate the witness." [223] It seems clear that in the hypothetical case there is no practicable substitute to pretrial release for investigative purposes.

A third kind of "special prejudice" is posed by the hypothetical case. The defendant was involuntarily exhibited in a lineup, which resulted in substantial new prosecution evidence against him, and the police attempted to exploit the psychological effect of Williams' identification of the defendant by an interrogation which they hoped would produce a confession. The prosecution was able to obtain this dual advantage solely because of the defendant's pretrial detention status; if he had been enlarged on bail, police jurisdiction over him could not have been obtained without his consent.[224]

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[220] Note, 70 YALE L.J. 966, 969-70 & n.27 (1961).

[221] United States *ex rel.* Hyde v. McMann, 263 F.2d 940, 942-43 (2d Cir.), *cert. denied*, 360 U.S. 937 (1959):

> Hyde asserts that during the afternoon and evening he succeeded, where his counsel had failed, in locating the house where he claimed to have spent the night of February 7-8 and that he learned that a girl answering the description of Jo Ann had resided at the house but that she had left about seventeen days after the date of his arrest when the bar in which she worked was raided by the police.

The trial court refused a further continuance and on application for federal habeas corpus the Second Circuit found no denial of due process, the state being required to do no more than afford an opportunity for search *by counsel.* 263 F.2d at 943. The court was apparently convinced of Hyde's guilt ("It is small wonder that a jury convicted Hyde. . . ." *Id.* at 942.) and never discussed the bail issues which were pressed in the Brief for Petitioner pp. 2, 8-29.

[222] Fitts v. United States, 335 F.2d 1021 (10th Cir. 1964).

[223] *Id.* at 1023.

Whether or not involuntary subjection to the lineup of a detained indigent for the purpose of investigating other crimes of which he is suspected violates the Constitution has recently been the subject of conflicting decisions in the Eastern District of Pennsylvania.[225] In *Butler v. Crumlish*[226] Judge Freedman entered a preliminary injunction to restrain the police, finding "substantial merit" in the claimed violation of the equal protection clause. Although he deplored the "deep and wounding social inequality" of the bail system,[227] he stated that "differences that necessarily result from imprisonment while awaiting trial and freedom on bail cannot be made the foundation for any constitutional objection because of discrimination."[228] But this "furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself."[229] While this case became moot before it came on for full hearing on the merits, two others were subsequently brought before a different judge and decided contra,[230] and one of these is now on appeal.[231]

### b. Prejudice Created by Unnecessary Conditions of Detention

Like a small hole in a weakening dike, Judge Freedman's approach in *Butler v. Crumlish* though presently permitting but a trickle of doubt, may in time become the source of a torrent of change. If his standard—that what makes the lineup bad is that it goes beyond "those restraints which are an essential part of the management of a prison" [282]—is accepted, it will be but a short step to apply that same measuring rod to other aspects of pretrial detention. It is common knowledge that the county jail typically used for pretrial detention is, in the words of a leading penologist, "the lowest form of social institution on the American scene." [283] That the existing conditions of pretrial imprisonment—poor food and housing, overcrowding, inadequate or no recreation and exercise facilities—are neither "essential" to sound prison management nor "inherent in the confinement itself" [284] is ironically demonstrated by the fact that at the point when an accused is convicted and sentenced to imprisonment, his standard of living is almost certain to rise.[285]

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[224] Compare Lee v. United States, 322 F.2d 770 (5th Cir. 1963), where after indictment and fifteen days of detention two special agents went to the indigent prisoner's cell and questioned him. The court held that the admissions obtained by the agents were inadmissible and reversed, motivated in part by the unreliability of the testimony about the interrogation which the agents had never reduced to writing. The thrust of the majority's argument was that the evidence was the product of an "invidious discrimination against indigent defendants." *Id.* at 777. Strangely, however, the court never mentioned bail. As the crime was not capital and therefore bailable, Lee must have been detained because of inability to post bail and he was repeatedly referred to as indigent. Instead, the court found a violation of the right to counsel because Lee had not yet been assigned a lawyer, the Government conceding that "secret, ex parte interrogations of defendants are not conducted when a prisoner has counsel," and "legal ethics forbid . . . bypass[ing] the lawyer of a defendant fortunate enough to have the means to engage counsel." *Ibid.*

[225] *Compare* Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964), *with* Morris v. Crumlish, 239 F. Supp. 498 (E.D. Pa. 1965), *and* Rigney v. Hendrick, E.D. Pa. No. 37791, April 7, 1965.

[226] 229 F. Supp. 565 (E.D. Pa. 1964).

[227] *Id.* at 568. The inequality is "increasingly oppressive to the poor and the vagrant. It brings to mind Anatole France's ironic epigram that the law in its majestic impartiality forbids the rich and poor alike to sleep under bridges." *Ibid.*

[228] *Id.* at 566.

[229] *Id.* at 567.

[230] Rigney v. Hendrick, E.D. Pa., No. 37791, April 7, 1965; Morris v. Crumlish, 239 F. Supp. 498 (E.D. Pa. 1965).

[231] Rigney v. Hendrick, *supra* note 230.

Nor can the necessity for reasonable security against escape justify the kinds of restrictions on communication with the outside world which are common in detention jails: limitations upon and censorship of mail,[286] restrictions on newspapers and periodicals, a frequently total prohibition on the use of the telephone, inadequate facilities for confidential conversations with lawyers and others,[287] visiting privileges only for close relatives,[238] restriction of visits to times which are particularly inconvenient to members of the working class, conducting visits under restrictions which impede or censor communication and humiliate visitor and visited alike. These limitations are as unnecessary to the legitimate purpose of detention—security—as is the lineup, and, in their contempt for man's dignity and their probable tendency to coerce guilty pleas, far more pernicious as a contamination of the values for which due process stands. Whether or not such restrictions are deliberately intended to punish and humiliate, they certainly have that effect, and some judges use pretrial detention explicitly for punitive purposes, for example, to give the accused "a taste of jail."[239]

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[282] Butler v. Crumlish, 229 F. Supp. 565, 566 (E.D. Pa. 1964).

[283] McGee, *The Administration of Justice: The Correctional Process*, 5 NATIONAL PROBATION & PAROLE A.J. 225, 228 (1959).

[284] Butler v. Crumlish, 229 F. Supp. 565, 567 (E.D. Pa. 1964).

[285] *New York Bail Study* 723-25. The "pattern of custody" in New York detention prisons "is more restrictive than that ordinarily imposed on convicted prisoners in sentence institutions. . . . Overcrowding is particularly in evidence . . . . [D]etention is a period of oppressive inactivity." *Id.* at 724-25. See also FREED & WALD, BAIL IN THE UNITED STATES: 1964, at 43-45 (Report to the National Conference on Bail and Criminal Justice, 1964) [hereinafter cited as FREED & WALD].

In Trebach's sample of 359 convicted prisoners living in penitentiaries, those expressing a judgment as to the relative conditions between their pretrial jail and their sentence serving institution preferred the penitentiary by a ratio of 12 to 1. TREBACH, *op. cit. supra* note 218, at 83, 264.

> . . . [M]ost men came forth with critical comments . . . One . . . inmate . . . told me, "I'd rather do six months here than the two months I did down there [a New Jersey county jail]. They starve you to death, don't give you no exercise. They should do something about that place."

*Id.* at 82.

[286] I have in mind censorship of ideas and content, as distinguished from inspection of incoming mail to prevent importation of, for example, narcotics or files. As for limits on mail, see, *e.g.*, *Philadelphia Bail Study* 1055 (untried prisoner may write two letters a week).

[287] *Cf.* Lanza v. New York, 370 U.S. 139 (1962), where the state conceded it had used electronic devices to eavesdrop on the conversation of a prison inmate with his visitor.

> It has been reported that a New York trial judge found it necessary to release a prisoner without bail so that he would be able to consult his attorney, the judge not being able to feel confident after [the Lanza] incident that there was any jail in the State where the prisoner and his lawyers could be secure against electronic eavesdropping.

*Id.* at 149 (Warren, C.J., concurring).

From at least the time of Blackstone, who saw the period between confinement and trial as a "dubious interval" during which "a prisoner ought to be treated with the utmost humanity,"[240] it has proved as impossible politically and administratively to bring detention conditions up to minimum standards as was the effort to use legislative, administrative, or political means to put effective curbs on unlawful police search prior to *Weeks v. United States*[241] and *Mapp v. Ohio.*[242] Blackstone put the blame on the goalers, who "are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation."[243] Today we would suspect that, while administrative insensitivity to human values remains an important factor, much deeper forces are at work. Existing conditions of pretrial detention are an example of the limited efficacy of an ideal such as the presumption of innocence, particularly where such detention advantages the prosecution and the reduces the judge's burdens by contributing to a high rate of guilty pleas. Packer, in his exposition of a "crime control model" in criminal administration, states the prosecution position as follows: "If the present system of requiring bail for some reason or other stopped producing a high rate of pretrial confinement, it would have to be replaced by one that did."[244] If this represents the practicalities of the situation as seen by the prosecution and probably by many trial judges as well, then it is idle to expect the administrative machinery to press for any real reform of pretrial detention.

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[238] For an extreme application, see Akamine v. Murphy, 108 Cal. App. 2d 294, 238 P.2d 606 (1951), upholding refusal of jail to permit husband held pending trial to be visited by his wife, recently released from same jail, because of jail rule prohibiting released inmate from visiting any other inmate within thirty days of release.

[239] *E.g., New York Bail Study* 705. Compare the remarks of magistrates setting high bail in Philadelphia as indicative of their motives, for example: "He is a Puerto Rican. What a bum." "Anyone who hits his father ought to be electrocuted." "I'm going to make an example of you." *Philadelphia Bail Study* 1039. Chief Judge Roy W. Harper of the United States District Court, St. Louis told the National Conference on Bail and Criminal Justice that "one of the best deterrents is detention for about 24 to 48 hours to see the inside of a jail house." NATIONAL BAIL CONFERENCE 192.

[240] 4 BLACKSTONE, COMMENTARIES 297 (1st Am. ed. 1772).

[241] 232 U.S. 383 (1914).

[242] 367 U.S. 643 (1961).

[243] 4 BLACKSTONE, COMMENTARIES 297 (1st Am. ed. 1772).

The only proposed solution likely to have any success in raising the level of detention conditions is one patterned on the exclusionary rule: to condition the right to detain, which benefits the prosecution, upon minimization of prejudice and the maintenance of standards commensurate with the untried status of the detention population. The remedy for failure to meet this test would be immediate release on recognizance pending trial. Whatever may be the merits of the judicial doctrine that the courts will not interfere with the management of institutions for sentenced prisoners,[245] it should be inapplicable insofar as pretrial detention is concerned. The courts have a direct responsibility to supervise what happens between arrrest and trial in order to preserve the integrity of the trial process.

### c. Inevitable Prejudice in Any Form of Detention

Some of the inevitable concomitants of detention are obvious and need to be reiterated only because they are so significant. Most important, the detained prisoner cannot hold a job, which is probably the principal explanation of the empirical data to be discussed below which demonstrates that jail defendants fare far worse in the sentencing process, particularly in obtaining probation, than bail defendants. Second, if the defendant cannot earn a lawyer's fee he has no choice of lawyer and must take the counsel provided by the state. Third, the detained defendant's relationship with his family is curtailed and the possibility of his supporting them is terminated.

What is in danger of being overlooked, however, are more subtle facets of the problem. The following hypotheses have not been proved empirically; some of them probably are not susceptible to such proof. They are, however, plausible and should not be ignored in an attempt to calculate the extent of the detention system's contamination of the trial process.[246]

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[244] Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 41 (1964).

[245] See, *e.g.*, Mahaffey v. State, 87 Idaho 228, 392 P.2d 279 (1964) (for prisoner to obtain relief in courts from prison regulations, he must show such shocking treatment as to amount to cruel and unusual punishment). See generally Note, 110 U. Pa. L. Rev. 985 (1962).

[246] Research by Dr. Jerome H. Skolnick, of the Center for the Study of Law and Society, University of California, Berkeley, who is preparing a book tentatively entitled *Justice Without Trial*, will prove relevant to further study of these hypotheses. Sociological inquiry of the kind being done by Skolnick should give added insight regarding the problems posed in all of these hypothetical propositions.

(1) The expectations of all those connected with the administration of criminal justice—police, jailers, prosecutors, defense counsel, judges, probation officers—prejudge the jail case as a failure, and this prejudgment colors their actual disposition; for example, a probation officer assigned to write up a jail case has a bias before he begins because of the defendant's jail status. If this is true, then the statistics showing that jailed defendants do in fact fare comparatively badly in the disposition process may in part demonstrate nothing more than the operation of a self-fulfilling prophecy.

(2) The fact that the defendant himself shares this expectation of failure tends, along with the fact that he will generally have to find a new job, to reduce the chances of his successfully completing a period of probation.

(3) The quality of representation which a jail defendant obtains is adversely affected by pretrial detention because, instead of the defendant coming to his office, counsel must go to the jail to see the defendant, often under conditions unfavorable to privacy and mutual dignity. The added economic burden this places on the lawyer may be considerable in large cities where, as in Philadelphia, the detention prison is geographically remote from lawyers' offices. The result is a reduction in the frequency of pretrial consultation below that which is desirable and which would take place were the defendant on bail and able to come to the lawyer's office. The burden on the lawyer may also intensify his resentment if he is already concerned about the low work-to-fee ratio of much criminal representation.

(4) The quality of the lawyer-client relationship is adversely affected by pretrial detention because the jailed defendant will have less confidence in counsel and is more likely than a bailed defendant to feel that he is getting inadequate representation. Jail house consultation with the lawyer intensifies the defendant's disassociation with counsel because he has had no responsibility in the selection of the lawyer; confirms his opinion that because he has no money he is receiving second class legal services;[247] induces that resentment which

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[247] For the purpose of the defendant's attitude and its effect on his relationship with his lawyer, the fact that the state appointed lawyer may be as able as a retained counsel is not significant if defendants' opinion is to the contrary. The author on several occasions has observed a lawyer come into a detention jail where newly admitted prisoners are brought to him one by one. The lawyer's opening question was, in effect: how much money do you have or can you raise? The interview was terminated immediately if the answer was unsatisfactory. These rejected prisoners were later represented by the public defender and probably received better legal services than would have been provided by the private lawyers, who had reputations as fixers and as being legally incompetent. But the psychological undertones of such transactions are obvious and must impair the defendant's opinion of the fairness of the trial process.

the poor feel because they are treated as charity cases; and adds to his suspicion that the adversary system may in fact not be very adversary when counsel is a public defender who is paid by the state and whose professional career is the representation of jail house failures.

(5) The defendant's prospects for rehabilitation turn in part upon his outlook towards the fairness of the administration of justice, which is adversely affected by his detention experience. A defendant's attitudes are crystallized in prison, where the most obvious lesson of the pretrial period is that if you have money you go out, *i.e.*, that justice is for sale. Those familiar with detention prisons are aware that this cynical attitude dominates the value culture of the jail.

### 2. Empirical Evidence on Results of Detention

We have already noted some of the empirical data which documents the unfavorable effects of pretrial detention upon the ultimate disposition of jailed defendants' cases.[248] But the fact that there are correlations between pretrial jail status and less favorable dispositions does not of itself prove that there is a causal relationship. The problem of causation is nicely illustrated by some data reported by Professor Anders Bratholm at the University of Oslo. In discussing the kind of cases in which pretrial detention is ordered in Norway he says:

> The incidence of detention is highest for those persons who are later convicted and sentenced to an unconditional term of imprisonment. In round figures, about seventy percent of those persons were given an unconditional term of imprisonment for a felony have been remanded in custody while their cases were being investigated. Remand is common, too, in the case of accuseds who are subsequently to be let off with suspended sentences for felonies committed: about one-third of those who received a suspended term for a felony in Oslo in 1955 had been detained during the period of investigation. On the other hand, detention is comparatively rare in cases which are later disposed of by conditional suspension of the prosecution or dropped for lack of evidence.[249]

Bratholm's underlying data apparently parallel American studies in showing a correlation between frequency of pretrial detention and severity of ultimate disposition, but he seems to assume, quite plausibly, that this shows not that pretrial detention causes more severe disposition but rather that more dangerous offenders are more likely both to be detained and to receive a term of imprisonment. Furthermore, even if we assume that some unfavorable dispositions of jailed prisoners are caused by pretrial detention, we have no data to help us understand what particular aspect of detention is primarily responsible for this prejudicial effect. It has been suggested that it

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[248] See *Crisis in Bail: I*, at 960.

[249] Bratholm, *Arrest and Detention in Norway*, 108 U. PA. L. REV. 336, 340-41 (1960).

> would be intriguing to see whether as simple-minded a precaution as assuring detained prisoners access to a shower, a shave, and a clean shirt, and allowing them to enter the courtroom not under guard but in the temporary custody of their counsel, would have any perceptible effect on the pretrial-post trial prison syndrome.[250]

How much this type of experiment as well as correction of other abuses noted in the preceding subsection would reduce possible prejudice as reflected in dispositions statistics is now unknown and will probably remain unknown.

By far the best attempt to control this and other variables which might explain the more severe disposition of jail cases in terms other than as a result of the pretrial jail experience is Rankin's 1964 study in New York.[251] Like the other studies, Rankin's has demonstrated the strong correlation between pretrial jail status and a more unfavorable disposition; the following table summarizes this finding:

TABLE 1 [From Rankin] [252]
RELATIONSHIP BETWEEN DETENTION & UNFAVORABLE DISPOSITION

| *Disposition* | *Bail (%)* | *Jail (%)* |
|---|---|---|
| Sentenced to prison | 17 | 64 |
| Convicted without prison | 36 | 9 |
| Not convicted | 47 | 27 |
| Number of defendants | (374) | (358) |

Rankin has gone beyond other researchers, however, in introducing controls for some of the more obvious variables which might explain the association between detention and more unfavorable dispositions.

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[250] Wald, *Forward, Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. Rev. 631, 637 (1964).

[251] Rankin 641.

[252] *Id.* at 642. The sample was drawn from defendants arraigned on felony charges in New York City during 1961-1962 and studied as part of the Vera Foundation's Manhattan Bail Project. Defendants are categorized as "bail" cases if they were free for some or all of the time pending disposition, and were listed as "jail" cases only if they were in jail all of the time from arrest until disposition. The entry "convicted without prison" includes suspended sentence or choice of fine or prison.

Of greatest interest for our purposes are the controls for previous criminal records, whether the bail required of the defendant was low or high (over 500 dollars) and whether the defendant was represented by private counsel or by court-assigned counsel. The first two variables give some indication of the defendant's potential dangerousness, while if court-assigned counsel were noticeably less effective than a private attorney this too could have a significant effect on disposition. Each of these three factors, considered separately, was found to be significantly related both to detention and to the likelihood of a prison sentence; thus of defendants with a previous record, sixty-one percent were detained in jail and sixty-three percent were sentenced to prison, compared with thirty-eight percent and twenty-nine percent respectively for defendants with no previous record. "Therefore, it is possible that detained defendants receive more prison sentences than freed defendants not because they are detained but because the detention population contains a much higher proportion of defendants with previous records than does the free population."[253] To hold such a factor constant, the defendants were separated into two groups, "defendants with and defendants without previous records. Each group of defendants was then studied separately to learn if differences in disposition exist between bail and jail defendants."[254] When one considers the importance supposedly given to the presence or absence of a prior criminal record in determining sentence, the results of holding the factor of prior record constant are startling:

> Among those with no record, fifty-nine per cent of the jailed defendants received prison sentences, compared to ten per cent of the bailed defendants. Among those with prior records, eighty-one per cent of the jailed defendants were sentenced to prison, compared to thirty-six per cent of the bail defendants. Thus, jailed defendants were forty-nine and forty-five per cent more likely to be sentenced to prison. These percentages are no smaller than the original difference of forty-seven per cent, which existed before the factor of previous record was held constant.[255]

Similar results were obtained when the factors of bail amount and type of representation were controlled separately, and when all three factors were held constant at once, the difference between disposition of bail and jail defendants was only slightly reduced. "These findings," Rankin concludes, "provide strong support for the notion that a causal relationship exists between detention and unfavorable disposition."[284] Unless and until Rankin's data are disputed by later empirical evidence, courts dealing with this problem should assume that pretrial detention has a direct adverse effect on the disposition of the accused's case.

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[253] *Id.* at 646.

[254] *Ibid.*

[255] *Id.* at 647-48.

### 3. The Due Process Dilemma

What, then, are the implications under due process theory of the probably prejudicial effects of pretrial detention? We noted above that, in the case of a good bail risk where the only cause of detention was poverty, a very slight showing of prejudice should be sufficient to tip the constitutional scales. The difficult problem is presented by a case such as our hypothetical defendant's in which circumstances besides indigency create risks for the community were the accused released on bail. We have also noted that balancing of risks is typical of due process adjudications, so that for the hypothetical defendant we would be required to weigh the risk of prejudice to him as a result of detention against the risk to the community that if released he might abscond, commit further crimes, or injure the Government's informer. A court might find that in the case of the hypothetical defendant the risks to the community were of sufficient magnitude to take precedence, and therefore refuse to enlarge the defendant on his own recognizance.

The difficulty with the application of this traditional due process reasoning to the case of the hypothetical defendant, however, is that its practical consequence is to deny release to a bad risk indigent while still leaving open the possibility of release on bond for a bad risk rich defendant. While the hypothetical defendant would remain in jail because he constitutes a bad risk, successful professional criminals and racketeers retain an absolute right to bail preserved by state guarantees, probably by the eighth amendment, and in any event in federal cases by Federal Rule of Criminal Procedure 46. The question, therefore, is whether such discrimination can survive the scrutiny of the equal protection clause.

## *E. Equal Protection*

In 1956 the Supreme Court decided in *Griffin v. Illinois* that indigents could not be deprived of the benefits of a state's system of appellate review by a requirement that appellants purchase and submit a transcript.[257] Subsequent cases have consolidated the rule [258] and, have within narrow confines extended it beyond appeal to collateral proceedings [259] and to invalidate restrictions on indigent appeals which, while they do not entirely cut off appellate review, limit its quality as compared with the kind of review available to nonindigents.[260] It also now seems clear that the Court in these equal protection adjudications is beginning to engage in a kind of balancing of interests very similar to that which has obtained in due process cases.[261] Indeed, the *Griffin* rule probably rests on both clauses.[262]

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[284] *Id.* at 655.

The precise holding of *Griffin* is not particularly startling; ". . . the more one considers the *Griffin* case in context, the more he becomes persuaded that the result is squarely in the main current of [a] . . . constitutional development which has been steadily unfolding for a generation and more." [263] Nor should the decision have been entirely unexpected in the light of earlier case law.[264] Despite its generally accepted equal protection label, the decision's rationale is closely related to the parallel due process development in the indigent counsel cases.

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[257] 351 U.S. 12 (1956). Four justices found this requirement in both the due process and equal protection clauses. Mr. Justice Frankfurter, whose vote was needed to make up the majority, rested his concurrence only on equal protection grounds.

[258] *E.g.*, Burns v. Ohio, 360 U.S. 252 (1959) (state cannot compel indigent to post filing fee before supreme court would hear appeal); Eskridge v. Washington, 357 U.S. 214 (1958) (per curiam) (*Griffin* rule applied retroactively).

[259] Lane v. Brown, 372 U.S. 477 (1963) (state coram nobis); Smith v. Bennett, 365 U.S. 708 (1961) (filing fee for state habeas corpus).

[260] Douglas v. California, 372 U.S. 353 (1963) (state must appoint counsel to help indigent in first appeal whenever nonindigent could appeal and enjoy assistance of counsel).

[261] *Compare* Norvell v. Illinois, 373 U.S. 420 (1963), *with* Douglas v. California, 372 U.S. 353 (1963), *and* Eskridge v. Washington, 357 U.S. 214 (1958). Outside the *Griffin* area this same balancing has occurred. Thus even racial classifications have been upheld when balanced against what was considered to be compelling wartime necessity, Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); but the same clasification has been rejected where the equities on the other side were deemed less compelling, Oyama v. California, 332 U.S. 633 (1948). And see Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947) (apparently offense classification allowed to stand where it was causing little prejudice in results). See generally Note, 16 Stan. L. Rev. 394, 400-05 (1964).

[262] Part of Mr. Justice Harlan's objections to *Griffin* rest on his view that if a classification, here between rich and poor, is invidious, it would be so "in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences." Griffin v. Illinois, 351 U.S. 12, 35 (1956) (Harlan, J., dissenting). Thus to approach the problem of the poor in criminal cases "in terms of the Equal Protection Clause is, I submit, but to substitute resounding phrases for analysis. . . . The real question . . . is whether or not the state rule . . . is consistent with the requirements of fair procedure guaranteed by the Due Process Clause." Douglas v. California, 372 U.S. 353, 361, 363 (1963) (Harlan, J., dissenting). The Court seems to lump both together, as it has done in some appeal cases, see note 261 *supra*. If one takes the position that a balancing of state interests and the seriousness of the consequences of an invidious classification is a factor to be considered in equal protection cases, then it would appear to make little difference which label is used. See Norvell v. Illinois, 373 U.S. 420, 423-24 (1963): "Exact equality is no prerequisite of equal protection . . . . [S]ome practical accommodation must be made."

[263] Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. Chi. L. Rev. 151, 156 (1957).

[264] *Id.* at 152-54.

What most attracted attention to *Griffin*, I think, was the potential power of its logic to open a score or more of Pandora's boxes. The kind of sweeping language used by Mr. Justice Black in the opinion that announced the Court's judgment has a profoundly unsettling quality, for example, "There can be no equal justice when the kind of trial a man gets depends on the amount of money he has."[265] But such language standing by itself cannot be taken too seriously. One of the more fascinating aspects of the development of civil liberties in American law has been its illogical compartmentalization. To name only three examples which come immediately to mind: (1) the extensive development of the fourth amendment in the seizure of tangible evidence with, until very recently, parallel underdevelopment of the fourth amendment's restriction on seizure of the person; (2) our law of right to counsel for indigents with parallel neglect of important problems such as provision for adequate pretrial investigation; and (3) the startling failure to apply to fact finding in the field of sentencing any of the due process controls used in the adjudication of guilt.[266]

Experience should teach us, therefore, that the *Griffin* rationale may well be restricted to the compartment in which it germinated. If it is to escape, however, bail law certainly provides fertile soil. The first suggestion that the *Griffin* rule might apply to the financial barriers of the bail system came from the dissenting justices in the case itself:

> . . . some [accused] can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?
>
> The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such law.[267]

But the principle authority to date for the proposition that *Griffin* might have application in the bail field is a pair of dicta of Mr. Justice Douglas in the *Bandy* case.[268] In deciding on Bandy's application for release without financial security in 1960, Justice Douglas cited *Griffin* and asked: "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" [269] He did not answer the question but noted that: ". . . I approach this application with the conviction that the right to release is heavily favored and that the requirement of security for the bond may, in a proper case, be dispensed with." [270]

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[265] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[266] Williams v. New York, 337 U.S. 241 (1949). *But see* Townsend v. Burke, 334 U.S. 736 (1948) (sentencing judge cannot crack jokes while imposing on uncounselled defendant long prison sentence premised on misinformation).

[267] Griffin v. Illinois, 351 U.S. 12, 29 (1956).

[268] Bandy v. United States, 81 Sup. Ct. 197, 198 (Douglas, Circuit Justice, 1960); Bandy v. United States, 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961).

Seven months later, when application for release before him was renewed, he took up his question again:

> Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on "personal recognizance" where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.[271]

The *Bandy* case was an illustration of particularly aggravated discrimination; [272] at the time Justice Douglas made this last statement, Bandy had been in jail pending appeal for more than two years.[273] During this time the trial court had certified that his appeal was not taken in good faith; the Eighth Circuit then appointed a lawyer to represent him on his motion for leave to appeal and four months later dismissed the appeal as frivolous; the Supreme Court vacated that judgment and remanded the case for hearing on appeal; and nearly seven months after that remand the appeal had still not been decided. Justice Douglas, however, declined to act in Bandy's behalf because the application before him posed the same question as that presented to the full Court in a pending petition for certiorari from the refusal of the Eighth Circuit to reduce bail and release Bandy on his own recognizance.[274] The result was that Bandy spent another three and a half months in prison until the petition was

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[269] Bandy v. United States, 81 Sup. Ct. 197, 198 (Douglas, Circuit Justice, 1960).

[270] *Ibid.*

[271] Bandy v. United States, 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961).

[272] See the history of the case in note 274 *infra.*

[273] Bandy v. United States, 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961).

[274] Some indication of the complicated history of the *Bandy* case is required. Bandy was convicted of filing and collecting refunds on false and fictitious income tax returns. His first appearance in the reports was at 272 F.2d 705 (8th Cir. 1959) (per curiam), where it is said that he had already been convicted and the trial judge had certified that his appeal was not taken in good faith. The court of appeals appointed a lawyer to represent Bandy on his motion for leave to appeal in forma pauperis. This was on December 10, 1959. On April 25, 1960, the court denied his motion to appeal in forma pauperis and dismissed his appeal as frivolous, 278 F.2d 214 (8th Cir. 1960) (per curiam). Bandy then filed a petition for certiorari in the Supreme Court. Meanwhile he was in jail, for not surprisingly the court of appeals had denied him bail; given the view it took of the case—that the appeal was frivolous—it had no option but to deny bail, see FED. R. CRIM. P. 46(a)(2). Pending disposition of the petition for certiorari, Bandy filed an application for bail with the circuit justice for the Eighth Circuit, Justice Whittaker, which was denied on July 29, 1960. Always the diligent litigant, Bandy then filed a similar application with Justice

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Douglas. Justice Douglas, although "most reluctant to take contrary action" to that of Justice Whittaker, made inquiry of the Solicitor General, who stated that the petition for certiorari presented "substantial questions of law." Justice Douglas therefore granted bail in the amount of $5,000. Bandy v. United States, 81 Sup. Ct. 25 (Douglas, Justice, 1960). (At some point while the Eighth Circuit case was being litigated, Bandy was moved to a jail in Idaho, in connection with a pending prosecution in that district, which may account for the fact that Justice Douglas, who is circuit justice for the Ninth Circuit, acted in all subsequent reported individual applications.)

As Bandy was indigent, however, he was unable to post bond and he filed another application with Justice Douglas, this time requesting release on "personal recognizance" pending certiorari. While this application was pending, on December 5, 1960, the Court granted Bandy's petition for certiorari, vacated the judgment, and remanded the case for a hearing of the appeal. 364 U.S. 477 (1960) (per curiam). On the same day, Justice Douglas decided the application for release and issued what has erroneously been called his "first" *Bandy* opinion. After speculating on the right of indigents to release, Justice Douglas denied the application without prejudice to another application in the courts below for a hearing as to whether or not Bandy posed a substantial risk of absconding were he to be released without bond. 81 Sup. Ct. 197 (Douglas, Circuit Justice, 1960).

Apparently the court of appeals refused to reduce the $5,000 bail figure previously set by Justice Douglas, and while the appeal was pending in the Eighth Circuit, Bandy filed a new battery of petitions for certiorari in the Supreme Court, one of which asked the Court to review the judgment of the court of appeals refusing to reduce bail and release him on his own recognizance. He also renewed his application for similar release before Mr. Justice Douglas, and on June 28, 1961, Justice Douglas acted upon this application in his so-called "second" Bandy opinion, in which he reached the conclusion "that no man should be denied release because of indigence." 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961). Although his reason for denying without prejudice the earlier release application was because the Government's claim that the petitioner posed a risk "troubles me," 81 Sup. Ct. at 198, he now stated (82 Sup. Ct. at 13):

> . . . I reject the Government's argument, in opposition to these applications, that Bandy is a "poor risk." That argument was not made when release was sought on a $5000 bond. No reason is now put forward which makes it more relevant to release without security than to release on bond. The showing in this respect does not overcome our heavy presumption favoring freedom.

However, Justice Douglas declined to act because Bandy had asked for the same relief in his petition for certiorari, and if "the relief were granted by a single Justice, it would make the petition for certiorari moot." *Ibid.* As the petition for certiorari was not denied until October 9, 368 U.S. 852 (1961) (two petitions from Bandy's then pending Ninth Circuit case were also denied on the same day), Bandy spent another summer in jail.

The basis for Justice Douglas' abstention is a possible conflict between Federal Rule of Criminal Procedure 46(a)(2), which clearly gives "the circuit justice" the power to grant bail pending certiorari (query whether Justice Douglas was "circuit justice" in this Eighth Circuit case, but he apparently assumed he was within the rule), and the decision in Stack v. Boyle, 342 U.S. 1 (1951), that the denial of a motion to reduce bail is a final, appealable decision which can be brought to the Supreme Court on certiorari. The concurring opinion of Justices Jackson and Frankfurter in *Stack v. Boyle* includes a lengthy analysis of the various sources of the power of a Justice to grant bail, *id.* at 7, 11-18. The Court is explicit in not determining "the power of a . . . Justice to fix bail pending disposition of a petition for certiorari" on the bail issue, *id.* at 4 n.2. Justices Jackson and Frankfurter would apparently restrict Federal Rule of Criminal Procedure 46(a)(2) to petitions for certiorari on the merits and not allow the circuit justice to act individually on bail if a petition for certiorari involving bail was pending, Stack v. Boyle, 342 U.S. 18 (1951). This view, which Justice Douglas apparently accepted, not only does violence to the literal wording of rule 46(a)(2) but seems wrong on the merits. It invites precisely the kind of delay which occurred in *Bandy*, where a petition was filed during vacation. If the Jackson-Frankfurter position prevails, then a petitioner has no remedy at all during the summer and a less speedy one at other times. The purpose of rule 46(a)(2) is to avoid just such a contingency.

In any event, Justice Douglas had other courses of action open to him besides outright denial of Bandy's application. He dealt with the same question differently denied,[275] followed by nearly six months more until the appellate process was finally terminated.[276]

I have difficulty understanding why in this case Justice Douglas thought he should not act, and it is even harder to justify the denial of certiorari by the full Court. The ambiguity in the power of an individual Justice to bail in these circumstances which restrained Justice Douglas[277] was noted but not decided in *Stack v. Boyle* and discussed at length in that case in a concurring opinion by Mr. Justice Jackson.[278] Thus aside from the important substantive question raised by Justice Douglas, the *Bandy* petition posed an important question of prompt access to bail which only the Court could resolve and which needed to be resolved.[279] The *Griffin*-bail question, moreover, was put to the Court again in the same case by a dissent of Justice Douglas when the Court denied a later application by Bandy, which Justice Douglas would have treated as an application for recognizance release.[280] One is not supposed to draw conclusions on the merits from

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in *Stack v. Boyle* itself, referring the individual bail application to the full Court for prompt disposition. 342 U.S. at 4. In 1955 Justice Harlan faced the problem in Noto v. United States, 76 Sup. Ct. 255 (Harlan, Circuit Justice, 1955). He expressed similar concern because "my disposition of the application necessarily involves prejudging the very questions with which the Court must deal should the petition for certiorari be granted." But instead of denying the application, "I have consulted my brethren and have their approval of my considering this interim application." *Id.* at 257. He then proceeded to reduce bail to $10,000. The Court apparently did not regard Justice Harlan's action as having mooted the petition, for it later granted it and reduced bail to the same amount as that previously set on the individual application. 351 U.S. 902 (1956). Justice Douglas apparently used the same circulation device in another bail case before *Bandy*, Cohen v. United States, No. 795, 1961 Term, October 21, 1960 [*sic*] (Douglas, Circuit Justice), see Note, 112 U. PA. L. REV. 981, 997 n.114 (1964), and used it again later in a comparable situation. In McGee v. Eyman, 83 Sup. Ct. 230 (Douglas, Circuit Justice, 1962), he was individually presented with an application for stay of execution while a petition for certiorari on the same subject was concurrently before the Court. He proceeded to decide it after circulating the petition "to each of my Brethren." *Id.* at 231.

[275] Bandy v. United States, 368 U.S. 852 (1961).

[276] The appeal was decided on November 15, 1961, 296 F.2d 882 (8th Cir.) (conviction affirmed), and the petition for certiorari to review this decision denied on March 26, 1962, 369 U.S. 831.

[277] See note 274 *supra*.

[278] 342 U.S. 1, 7, 11-18 (1951). See discussion in note 274 *supra*.

[279] The question may not come up again, for in the present state of the law any well advised petitioner denied bail in the court of appeals will file an individual application with the circuit justice, and only if it is denied will he follow with a petition for certiorari, thereby gaining two bites at the apple. The proposed changes in the federal rules have not dealt with the problem. See PROPOSED AMENDMENTS, RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2d Prelim. Draft 1964).

[280] See Bandy v. United States, 369 U.S. 815, decided March 19, 1962. This was a "motion for leave to file petition for writ of habeas corpus," and Justice Douglas' dissent would have treated "this application as one for release on personal recognizance," and he makes the statement that "as of the date of this application the appeal had not been disposed of." But the appeal had been decided months before and the following week the Court denied the petition for certiorari from that decision. See note 275 *supra*.

a denial of certiorari, but under these circumstances the suspicion lingers that at least for the time being the other Justices are not in a hurry to indorse Justice Douglas' dictum on the applicability of *Griffin* to bail.

Be that as it may, seldom has a dictum born in chambers under such circumstances, and apparently stillborn at that, travelled so far so fast. It has been discussed sympathetically by the Chief Justice in an address to the National Bail Conference,[281] cited by the Attorney General's committee[282] and in the proposed revision of the federal rules governing bail,[283] and cited and discussed in the Court of Appeals for the District of Columbia.[284] In the recent District of Columbia case of *Alston v. United States*, the issue was apparently squarely posed.[285] The court of appeals had previously set bond at a figure defendant could not afford, and when the Government moved to postpone argument and this was granted, Chief Judge Bazelon took the position that the postponement should be conditioned upon the court sua sponte reducing bond to an amount defendant could afford. Pending trial Alston had been released on a one hundred dollar personal bond on recommendation of the District of Columbia Bail Project, and he had "long-standing ties to the community, excellent prospects for employment on release, and no prior criminal record."[286] Thus Alston was precisely the kind of defendant Justice Douglas envisaged as constitutionally entitled to release.[287] A divided court of appeals, however, declined to act on the suggestion.

Probably the applicability of *Griffin* to the bail situation will in large measure depend upon the kind of analysis which is made of the purposes of the bail administration. I have already noted[288] the difficulty of this determination. In part, certainly, bail administration serves the legitimate objective of compelling appearance in court, but the method used to achieve this purpose is one that necessarily prejudices the poor.

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[281] National Bail Conference 6, 8.

[282] Att'y Gen. Rep. 85-86.

[283] Proposed Amendments, to Rules of Criminal Procedure for the United States District Courts, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 52-53 (2d Prelim. Draft 1964). See also Sullivan, *Proposed Rule 46 and the Right to Bail*, 31 Geo. Wash. L. Rev. 919, 929-32 (1963).

[284] Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., concurring); Pannell v. United States, 320 F.2d 698, 699, 701 (D.C. Cir. 1963).

[285] Alston v. United States, 343 F.2d 345 (D.C. Cir. 1964) (per curiam).

[286] *Id.* at 346 (Bazelon, C.J., dissenting).

[287] Bandy v. United States, 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961). See note 271 *supra*.

[288] See text at pp. 1136-37 *supra*.

Given the result of substantial discrimination, the mere existence of a legitimate state objective does not preclude the applicability of the *Griffin* rule. In the *Griffin* line of cases, too, the legitimate purpose of the invalidated practices was evident and conceded: to control frivolous appeals and needless expense to the state. The state's position was succinctly stated by Mr. Justice White in his dissent in *Draper*, where he noted that the decision in that case "severely limits the power of the States to avoid undue expense in dealing with criminal appeals. It places their appellate processes in an unflexible procedural strait-jacket."[289] Presumably it was not entirely arbitrary for a state to conclude that frivolous appeals were an unjustified burden upon appellate machinery; that the cost of an appeal, much of which consists of legal fees and the expense of a transcript is a significant deterrent to frivolous appeals by nonindigents; and that as indigents are not subject to this self-regulating mechanism, they will impose a heavy burden upon the state[290] unless their appeals are subject to some form of control. If this control means that the poor are denied appeal,[291] or restricted in their access to appellate courts,[292] it is an unfortunate by-product of a rule justified as the most practicable method of achieving a legitimate end. Presumably the state could limit frivolous appeals by screening out indigent and nonindigent appeals according to a common standard, as the Court suggested in *Draper*[293] and as is required in federal in forma pauperis procedure.[294] But such screening is an expensive and time-consuming task, itself imposing on courts a major burden which they cannot delegate.[295] Screening, moreover, is frought with risks of great injustice, for the Court's opinion in *Draper* stresses the limitations of a hearing on an inadequate record,[296] which is the only way to screen if the screening procedure itself is not to turn into a full hearing on the merits.

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[289] Draper v. Washington, 372 U.S. 487, 509 (1963) (state practice used to screen applications for transcripts invalid, even though transcript not a prerequisite to appeal, where nonindigents could obtain more complete appellate review with transcripts).

[290] "We all know that the overwhelming percentage of *in forma pauperis* appeals are frivolous. Statistics of this Court show that over 96% of the petitions filed here are of this variety." Douglas v. California, 372 U.S. 353, 358 (1963) (Clark, J., dissenting).

[291] *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

[292] *E.g.*, Draper v. Washington, 372 U.S. 487 (1963).

[293] *Id.* at 499.

[294] Coppedge v. United States, 369 U.S. 438 (1962) (indigent's appeal can be held frivolous for purpose of denying certificate of good faith for appellate review only if appeal would be dismissed as frivolous in case of nonindigent appellant; Ellis v. United States, 356 U.S. 674 (1958) (per curiam).

[295] Lane v. Brown, 372 U.S. 477 (1963) (delegation to "state officer outside of the judicial system" of final power to foreclose appeal by refusing to order transcript invalid).

[296] 372 U.S. 487, 498-500 (1963).

One would suppose that this kind of argument would find a sympathetic ear in a Court which knows first hand from its own certiorari practice the burden and limitations of screening cases. That it was rejected means that we can paraphrase the *Griffin* rule as follows: at least as to appeals, a state cannot seek a legitimate objective by means which result in substantial discrimination against the poor even if the only alternatives result in a considerable added burden in expense and judicial administration.

An important parallel between the equal protection cases and the bail problem involves delegation of power by the judiciary to control enjoyment of a basic right. *Lane v. Brown*[297] invalidated an Indiana statute by which, in post-conviction procedure, the transcript required for an appeal from denial of a writ of coram nobis could be obtained by an indigent only in the discretion of the public defender. A unanimous Court[298] found the vice in this procedure to be that it "confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal . . . ."[299] In bail practice the bondsman—not a state officer and often of questionable reputation even as a private person—is vested with somewhat similar discretion in the administration of the eighth amendment.

It will be recalled that the hypothetical defendant's only cash resource is the forty dollars taken from him on arrest. Let us suppose that the police returned this to him, that his sister managed to raise an additional sixty dollars, and that a court impressed with his need to search for his witnesses reduced his bail to 1,000 dollars. In theory he should now get out in a jurisdiction where the fee is ten per cent. We should note at the outset that if this theory prevailed and the hypothetical defendant goes free, he stands to gain nothing financially by waiting around for trial. Whether he waits or absconds, he will still owe his sister sixty dollars and be out his own forty dollars. The only person who stands to lose from his flight is the bondsman, whose security is his civil cause of action against a missing indigent.

Because of this risk and the bondsman's role as a private businessman free to accept or reject customers, the mere fact that the hypothetical defendant's bond has been reduced to 1,000 dollars and that he has 100 dollars in cash is no guarantee that he will get out. In practice his release is entirely up to the bondsman, who may be satisfied with the 100 dollar fee,[300] or demand an additional under-the-table sweetener,[301] or require collateral less than, equal to or greater than the amount of the bond,[302] or simply refuse to do business with the defendant at all.[303] Thus when a court decides that 1,000 dollars bail is sufficient, in fact it does not know what it is requiring of the defendant, who may still be denied all release or have to put up anything from 100 dollars to the full amount of the bond.[304] As Judge Wright has noted:

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[297] 372 U.S. 477 (1963).

[298] Justices Harlan and Clark concurred on due process grounds. *Id.* at 485-86.

[299] 372 U.S. at 485.

[300] The likelihood that this would happen depends in major part on the jurisdiction's forfeiture policy; where the rate of collections on forfeiture is high, the

> The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. . . . The court and the commissioner are relegated to the relatively unimportant chores of fixing the amount of bail.[305]

What the government gets out of this shoddy business is of critical importance to resolution of the constitutional question. If a

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requirement of collateral is probably close to one hundred percent, for example in Detroit. Freed & Wald 26. In New York most bondsmen require collateral although "occasional exceptions are made when the defendant has 'strong ties in the city and a good record.'" *New York Bail Study* 704. One New York bondsman stated: "If a person comes in and I don't know him or his lawyer, we look for collateral; if they don't have it, we don't bother with them." Freed & Wald 27.

Defendants who probably have the least difficulty obtaining release for the stated premium are members of criminal syndicates, where provision of bond is part of "the smooth operation of the criminal enterprise," with the security to the bondsman not the resources of the individual defendant but the syndicate. Freed & Wald 35, quoting a 1964 New York Bar Report.

Conversely, defendants held on nominal bail may have considerable difficulty. In an opinion which gives considerable information on the mechanics and economics of the bonding business in New York the court noted that "it is generally the minor or low bail offender, whose even temporary detention is not justified by the crime charged, who finds himself" not solicited by bondsmen "because his low bail is unprofitable." People v. Smith, 196 Misc. 304, 307, 91 N.Y.S.2d 490, 494 (1949).

[301] On the frequency of illegal overcharging see Freed & Wald 33; *Philadelphia Bail Study* 1047. Bondsmen may also condition their services on other factors, for example, hiring a particular lawyer with whom they have an illegal tie-in arrangement. *Ibid.*

[302] Freed & Wald 26-27; *New York Bail Study* 704; see note 300 *supra.*

[303] Freed & Wald 33-34 & n.46:

> Estimates by individual bondsmen respecting the percentage of cases they reject vary from 5% in Baltimore and Greenville, South Carolina, 25% in Denver, Colorado, Champaign-Urbana, Illinois and Jackson, Mississippi; 45% in Asheville, North Carolina and 50% in Philadelphia, Elizabeth City, North Carolina and Atlanta, to 60-85% in Birmingham. These figures presumably do not include indigents who cannot raise the money to call a bondsman in the first place.

"Civil rights demonstrators have reported extraordinary difficulties in finding bondsmen to bail them out in some southern cities." *Ibid.* See also Hairston v. United States, 343 F.2d 313, 316 (D.C. Cir. 1965) (per curiam) (Chief Judge Bazelon's dissent referring to refusal to write bonds in the District of Columbia).

[304] The only court reports I have seen which give any indication that judges are aware of this problem have come from the District of Columbia, and those in recent years. See, *e.g.*, Hairston v. United States, 343 F.2d 313, 315-17 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., dissenting); Pannell v. United States 320 F.2d 698, 699-702 (D.C. Cir. 1963) (concurring opinion and opinion concurring in part and dissenting in part).

[305] Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

defendant absconds the government is entitled to a forfeiture of the bond; the cost of returning the fugitive to the jurisdiction when he is located elsewhere may be borne by the bondsman. In the latter event, the practice is to remit at least part of the forfeiture. But while a few cities have followed a policy of strict collections on foreitures, "collection of forfeited bonds has often been lax or tinged with scandal";[306] probably the fullest examination remains that done more than ten years ago in the *Philadelphia Bail Study*, which found a collection rate in 1950 of twenty per cent on forfeited and unremitted bonds.[307]

In determining collection policy, the government is caught in a vicious circle. The objective of the bail system is to get defendants out of detention, but tough forfeiture and collection policies increase the bondsman's risk and force him to be more selective,[308] thereby magnifying the problem of presumably unconstitutional delegation of bail setting and increasing the proportion of defendants held in jail. Bondsmen, however, have threatened to go on "strike" and in 1961 and 1964 in New York in part carried out this threat, refusing to write bonds except on one hundred per cent collateral in bankbooks or real estate.[309] These strikes were "said to be in retaliation for tighter enforcement policies of forfeitures instituted by 'uncooperative' district attorneys" and the effect in 1961 was "overcrowding the city's detention facilities and jailing numerous minor offenders for want of small bonds . . . ."[310] A New York bar committee has noted that a concerted strike "would have a genuinely chaotic effect upon the City prisons in very short order."[311] Nothing could more graphically demonstrate the extent to which the important governmental function of regulating pretrial detention has been delegated to private business.

An additional factor affecting government collection policy is that not all bonds are written by professional bondsmen. In Philadelphia in 1950 forty-five per cent came from private sources.[312] Unlike commercial bond, private bail presumably does put some pressure on the defendant not to abscond, and one would expect what was in fact found in the Philadelphia study: that the forfeiture rate for private bond was less than half that of professional bond.[313] A tough collection policy, however, appears to drive private bail off the market. In Detroit, which has prided itself on one hundred per cent collections, ninety-five per cent of the bail was written by surety companies, and when Philadelphia instituted more vigorous collection policies in the fall of 1952 the proportion of bonds posted by private sources declined sharply.[314] In most large cities it is probable that this result has already occurred; in New York it was reported that almost no private bail is being posted.[315] It is ironic that the form of bail one would suppose to have the most deterrent value has been or is being destroyed.

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[306] Freed & Wald 30.

[307] *Philadelphia Bail Study* 1061-62.

[308] For methods of selection see Freed & Wald 33: *e.g.*, "bondsmen generally avoid narcotics defendants ('they usually don't wake up on time to get to court'), prostitutes ('they have no roots'), forgers ('they travel too much'), scofflaws, and alleged subversives ('bad publicity'). Because of the speed with which the bondsman's decision is made, it is often based on pure intuition." Compare *Philadelphia Bail Study* 1065-66 (bondsman has little flexibility within system to protect himself against bad risks). See also *Crisis in Bail: I*, at 997-98.

[309] Freed & Wald 27.

[310] *Id.* at 28.

[311] *Id.* at 27.

[312] *Philadelphia Bail Study* 1060.

All the available evidence indicates that under present conditions the risk of absconding is low. The four district survey of the Attorney General's Committee found the rate of failure to appear ranged from one to seven per cent:[316]

> Many such instances presumably involved minor technical defaults. It is thought that comparatively few of them were cases of "bail jumping" in which the defendant disappeared to avoid trial or punishment.[317]

The Committee then added: "Thus qualified, these 'failure' figures may be thought to raise a question whether pre-trial liberty involves a substantial enforcement problem."[318] The forfeiture rate in the *Philadelphia Bail Study* was two and a half per cent, and a survey of other cities showed rates as low and usually much lower.[319] Furthermore, most of the forfeitures involved petty cases; the two and a half per cent dropped to 1.35 per cent when gambling, liquor and traffic offenses were eliminated.[320] Other more recent data is consistent with these findings.[321]

The claims that bondsmen provide any significant function in policing those on bail and finding them once they have absconded seem frivolous to me. There is no evidence that they actually perform any significant custodial function, and it is unreasonable to expect them to do so. As for finding fugitives, it is the police and the FBI who have the communications network necessary for this task, not the bondsmen.[822] What does happen is that the government receives partial remuneration for the cost of returning a fugitive once he has been found from forfeitures and from the bondsman's services. The equal-protection-on-appeal cases make short shrift of any claim that the petty financial economies which thus accrue to the state can justify the discrimination implicit in the system.

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[313] *Id.* at 1063, figure 4.

[314] *Id.* at 1060-61.

[315] *New York Bail Study* 703-04.

[316] Att'y Gen. Rep. 129-30.

[317] *Id.* at 130.

[318] *Ibid.*

[319] *Philadelphia Bail Study* 1061-62.

[320] *Id.* at 1062.

[321] For example in the Eastern District of Michigan, 1962: 553 defendants released, eight defaults; District of Columbia: bail jumping "in a very small proportion" of cases. Freed & Wald 29.

These data suggest a compelling case for the application of the *Griffin* rule to bail. Because bail denial both affects the quality of the original trial and imposes imprisonment before there has even been a first finding of guilt, the discrimination is more aggravated than at the stage of appeal with which *Griffin* was concerned. The major factor which distinguishes bail from the *Griffin* cases is the unknown of what would happen if all defendants now detained pending trial were instead released during this period. It is impossible to determine whether the low forfeiture rates for bailed defendants would prove to be a reliable index for the rate of absconding to be expected from presently jailed defendants. There is no reason, however, to expect an alarming rise. The principal deterrent against flight is the danger of being caught again and suffering an added detriment as a result. If this is reinforced by the provision of explicit criminal sanctions for flight[823] and a policy against release a second time of defendants who have previously absconded, it should be sufficient to control the problem. Provision could be made for additional protection in cases of unusually high risk: supervision of the defendant by a probation officer, or a system of daily or weekly reporting,[824] or advancing the date of trial for the particular defendant to shorten the duration of the risk period. Failure of a defendant to comply with such conditions or his use of unreasonable delaying tactics in going to trial could then be made the basis for subsequent detention.

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[822] *Philadelphia Bail Study* 1067.

[823] *E.g.*, 18 U.S.C. § 3146 (1958) (failure to surrender within thirty days of forfeiture of bail—five years if original crime felony, one year if misdemeanor); MINN. STAT. ANN. § 609.49 (1964) (felony defendant who fails to appear within three days—one year and $1,000). See the discussion of these statutes in *Philadelphia Bail Study* 1068. For a proposed statute making nonappearance a criminal offense, see *id.* at 1073 n.157; the statute

> provides a severe penalty for fugitives who do not appear within 30 days of the time required; proscribes "judge-jumping" by providing a lesser penalty for those who do not appear on the day required but do appear within 30 days; protects the defendant when he has a lawful excuse for non-appearance, but makes proof of non-appearance constitute prima facie evidence of a violation; and protects both the state and the defendant by requiring fingerprinting before release and by appropriate notice provisions.

*Id.* at 1073-74.

[824] See Sica v. United States, 82 Sup. Ct. 669, 670 (Douglas, Circuit Justice, 1962) (Sica's bail pending appeal conditioned on his staying in the district and "personally reporting each day, excluding Sundays and holidays, to the United States Marshal . . .").

It should be recalled that although other major constitutional reforms in the last decade—search and seizure, right to counsel, and *Griffin* itself—were accompanied by predictions of dire and unmanageable consequences, there is no evidence that an accommodation may not in fact be achieved. If in the case of bail reform experience should prove that the rate of absconding rises unreasonably, a solution should be sought within the rationale of the eighth amendment's policy of pretrial release, through measures which are applicable to rich and poor alike, and not by financial discriminations.

## IV. Preventive Detention and the Eighth Amendment

It will be recalled that Mr. Justice Douglas' *Bandy* dictum concluded that "a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."[325] Resting as it does on *Griffin*, the statement is puzzling because it would still leave the indigent at a substantial disadvantage vis-à-vis the nonindigent, who would continue to have an absolute right to release on bond if he could afford the price whether or not it was "reasonable to believe that he will comply with the orders of the court." As we have seen, *Griffin* has been extended to bar limitations on the quality of appellate review made available to indigents compared to that afforded nonindigents.[326] If *Griffin* is applicable to the bail situation, as I believe it should be, I would suppose that the whole doctrine is applicable and that selective detention of indigents by standards not applied to nonindigents would be invalid.

Nonetheless Justice Douglas' suggestion has inspired a number of recommendations[327] and legislative proposals[328] for reform. While at first these were put forward in a form which would make them applicable only to indigents, the logic of *Griffin* is leading to consideration of a system of preventive detention which would be applicable to rich and poor alike. In a Senate speech on March 4, 1965, Senator Ervin stated:

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[325] Bandy v. United States, 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961).

[326] See notes 260, 261 *supra.*

[327] *E.g.*, Att'y Gen. Rep. 76 (recommending "release of the accused on his own recognizance without additional financial securities, in proper cases . . .").

[328] *E.g.*, S. 1357, 89th Cong., 1st Sess. (1965), which would revise bail practices in accordance with a congressional finding that "persons reasonably expected to appear at future proceedings should not be deprived of their liberty solely because of their financial inability to post bail . . . ." § 2(a)(2). Provision is made for use of a wide range of alternatives to traditional bail, § 3(a), and provides for an appeal from a decision on release (presumably made by a commissioner) to the district court, an appeal which emphasizes the delay difficulty by the requirement that it be decided within ten days. It would also provide that time spent in custody pending conviction would be credited against any sentence of imprisonment imposed. § 4. This is a much needed reform; for a discussion of current federal statutes on the subject and their inadequacies see Short v. United States, 344 F.2d 550 (D.C. Cir. 1965).

> . . . [M]any commentators on the American bail system . . . recommend that the present laws providing an absolute right to bail should be discarded, that release should be optional, and that procedures for a prompt review of bail decisions should be developed. It is argued that these modifications would not only be more effective in protecting society from dangerous offenders who can meet financial bail requirements or flee the jurisdiction of the court, but would also provide a more reliable bail system for releasing persons whose community ties qualify them for release.[329]

This position, of course, rests upon an interpretation of the eighth amendment squarely opposed to that advanced in this article. Senator Ervin took the position that the eight amendment "does not appear to confer an absolute right to bail,"[330] citing *Carlson v. Landon*,[331] which I have discussed above and which does not appear to be very persuasive authority for that position.[332] Aside from the constitutional question, however, it will be useful to examine the concept of preventive detention on its possible merits as sound policy.

Such proposals have all the seductive appeal of the maxim that an ounce of prevention is worth a pound of cure, but the impropriety of the application of that maxim to a democratic system of criminal law should give one pause. Behind the proposals are certain assumptions:

(a) that the contingencies which are to justify detention are sufficiently narrow and precise to be capable of administration as meaningful legal standards;

(b) that we have the ability to predict the probability of occurrence of these contingencies in individual cases;

(c) that there is or will be an investigatory structure which can develop the facts necessary for decision;

(d) that there is or will be an adjudicatory system before a person competent to make the necessary prediction, with right to counsel, hearing, an opportunity to contest the facts and their application to law, and provision for appellate review;

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[329] 111 CONG. REC. 3993 (daily ed. Mar. 4, 1965).

[330] *Ibid.*

[331] 342 U.S. 524 (1952).

[332] See *Crisis in Bail: I*, at 979.

(e) as time is of the essence in a process where even a day's delay is important and five or six weeks moots the entire issue, that the fact-finding, adjudication, and appellate review can all be accomplished with great dispatch.

### *A. Standards for Detention*

In determining the substantive standards which might be proposed for preventive detention, lack of precision is as much a vice as is vagueness in the substantive criminal law. A standard which provides merely for detention if the accused is deemed a danger to the community[883] or if it would not be "proper"[884] to release him gives no guidance to trial judges, permits no effective appellate review and invites abuse by allowing the trial judge to indulge his own feelings and prejudices.

More specific grounds usually advanced as possible bases for preventive detention include the risk of nonappearance for trial, the danger that the accused will commit a crime while on pretrial release, the danger that he will intimidate witnesses, harm a complaining witness or attempt to influence a juror, or anticipation that the community would be incensed were the accused not locked up pending trial. I would reject this last proposed standard as inconsistent with our whole philosophy of accusatorial procedure. The community is always likely to be intolerant of due process and equal protection in cases where feelings run high, and I see no more reason to give in to the temporary popular feelings in this situation than in any other. As Mr. Justice Douglas said in a case involving bail pending appeal: ". . . equal justice under law requires that bail not be denied even a notorious law-violator if he has a substantial question to be resolved on appeal."[885]

The risks of flight and criminality need further narrowing if they are to be used as standards. What kind of nonappearance for trial, for example, should warrant detention? The *Philadelphia Bail Study*, as we have noted, found that out of an overall forfeiture rate of two and one-half per cent, most failures to appear resulted from flight pending charges of minor crimes.[886] In view of the strength of the policy against detention, is bringing a gambler or a prostitute to trial of sufficient importance to warrant detention if there is a finding of a risk of nonappearance? Second, most nonappearance is temporary. In Philadelphia a common complaint was that defendants on bail did not appear on the day scheduled if they were slated to appear before a "hanging judge," but instead would show up soon thereafter. Such judge-jumping is a nuisance and complicates court calendars; is it enough to warrant detention? One of the Vera Foundation's New York studies examined the reasons for nonappearance given in the 785 cases in 1963 in which actions were instituted for remission of forfeitures.[337] The most frequent reasons for missing court were: illness (32.4 percent); forgot or confused on date (22.8 percent); incarcerated elsewhere on that date (14.3 percent); problems in notification of the defendant of the date (11.1 percent); and was in court on scheduled day but, *inter alia*, went to wrong room, or appeared at wrong time (9.2 percent).[338] All these were technically instances of nonappearance; that they were not, however, regarded as serious may be seen from the fact that remission was not opposed by the District Attorney in 96.3 percent of the cases.[339]

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[883] Rehman v. California, 85 Sup. Ct. 8 (Douglas, Circuit Justice, 1964) (denying bail pending appeal where state court held appellant's enlargement would present "an immediate, clear and present danger imperiling, jeopardizing, and threatening the health, safety, and welfare of the community"); D.C. Cir. R. 33(f), cited in Hairston v. United States, 343 F.2d 313, 316 n.13 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., dissenting) (providing for denial of bail pending appeal when "the safety of the community would be jeopardized").

[884] Att'y Gen. Rep. 76.

[885] Cohen v. United States, 82 Sup. Ct. 8, 9 (Douglas, Circuit Justice, 1961).

[886] *Philadelphia Bail Study* 1061-62; see p. 1162 *supra*.

The narrowness and precision with which the standards are stated will to some extent avoid the temptation to base a case for detention on what Chief Judge Bazelon has called "the government's conclusory allegations."[340] Unless the standards are sufficiently narrow to require proof of particular circumstances which set the individual case apart from the general run of cases, there are no real limits on detention. Judges in bail cases which come up on appeal where denial of bail is discretionary frequently refer to a defendant's prior criminal record or the fact that he faces the probability of a substantial prison sentence as grounds for denying bail in a particular case. But a high proportion of defendants share one or both of these characteristics.[341] Unless something more precise than such variations on the themes of bad reputation and bad prospects is required, probably a majority of all defendants would be detainable and the decision from among this group of whom to detain and whom to free would turn not on legal standards relevant to the state's legitimate objective but rather on the vagaries of judicial temperament or the masking of illicit objectives, for example, to give the defendant "a taste of jail."

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[337] A Summary of the Reasons Given by Defendants for not Appearing in Court (Vera Foundation, New York, 1964) (unpublished mimeo).

[338] *Id.* at 8.

[339] *Id.* at 4.

[340] Pannell v. United States, 320 F.2d 698, 701 (D.C. Cir. 1963) (Bazelon, C.J., concurring in part and dissenting in part).

[341] See, for example, the concern of Judge Clark, who denied bail in a case where an applicant with a long criminal record, "many incentives to skip bail," and "little to hold him," but who added: "I do not want to get into the position of saying that a charge as a multiple offender automatically renders the accused ineligible for bail." United States v. Wilson, 257 F.2d 796, 797 (2d Cir. 1958) (Clark, J., sitting alone).

These considerations are particularly acute in determining what standards to use to evaluate the risk of nonappearance. Any defendant who thinks he is going to be convicted and sentenced to prison, an entirely subjective contingency we cannot estimate with any certainty, has an incentive to flee. Any defendant who is free has the means to accomplish flight—all he has to do is to go, hitch-hiking if he has no better means of transportation. To find as facts, therefore, "that there is considerable motivation for these defendants to flee the court's jurisdiction and that they have ample means to accomplish this purpose" [842] is almost entirely meaningless, for the facts found fail to distinguish the case being decided from most others. More superficially plausible would be suggestions to use the extent of defendant's ties to the community as a measure. It should be noted, though, that this is merely an hypothesis; to my knowledge there is no data to allow us to assess the comparative risk of flight of a no-ties-to-the-community defendant and a strong-ties defendant. More important, even if the no-ties defendant is three times as likely to flee, it proves very little, for only around one out of thirty or forty defendants is likely to flee in any event.[843] The kind of reasoning that underlies the tie-to-the-community standard is premised on statistical sleight of hand. If, being a pipe smoker, I am informed that pipe smokers are three times more likely to get some dread disease than nonsmokers, this sounds like black news indeed. But if the incidence of the disease in question is only one per one hundred population, my chances of succumbing are still very small.

An added problem with a standard such as the defendant's reliability and roots in his community is that in application it will inevitably result in discrimination against the poor and, indirectly, the Negro. One aspect of that fifth of the population that might be considered as living in poverty is that relatively speaking it is rootless. An accused drawn from this stratum is less likely than the average individual to own property or to have a job and more likely to be a "drifter." Because law enforcement at the police discretion level also operates discriminatorily against the poor, an indigent is also more likely to have a criminal arrest record for conduct which would not produce such a record in a better class neighborhood, for example, for "corner-lounging." Our magistrates, justices of the peace, and lower judiciary who set bail today are conditioned by long custom to seeing the poor denied pretrial release because they are poor. Any reform has difficulty uprooting such ingrained habits of procedure. To permit preventive detention because an accused has shallow roots or is vaguely dangerous is to invite perpetuation of the present discriminatory pattern under new labels.

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[842] Ward v. United States, 76 Sup. Ct. 1063, 1066 (Frankfurter, Circuit Justice, 1956).

[843] See p. 1162 *supra*.

Enough has been said to indicate the kinds of problems facing anyone who tries to draft a statute which would introduce preventive detention as a substitute for the financially-oriented bail system. Difficulties of this kind may have prompted Mr. Justice Jackson, urged to deny bail because of alleged danger of the applicant's "anticipated but as yet uncommitted crimes," to say that "imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it. . . ."[344]

### *B. The Feasibility of Prediction*

Evaluation of the desirability of attempting to predict such criteria for determining pretrial detention as flight, anticipated serious criminal conduct, or intimidation of witnesses turns both on our underlying set of values and on whether or not we possess the knowledge which such predictions would require. This can best be illustrated if we take an example.

We have seen that existing data show a very low incidence of flight for the purpose of avoiding trial and that there is no reason to expect that this would be significantly increased by the release of indigents.[345] Leaning over backwards to overstate the risk, I will assume that under present conditions the rate of absconding to avoid trial is one and one-half percent of bailed cases, and then I will double this rate to allow for any additional risk created by the release of all indigents. This leaves us with a pretrial defendant population of which we would expect three percent to try to avoid trial by flight.

In any situation in which the event to be predicted occurs so infrequently in the population concerned, any attempt to individualize prediction must start off against very heavy odds.[346] By the simple expedient of releasing every defendant pending trial, the implied pre-

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[344] Williamson v. United States, 184 F.2d 280, 282 (Jackson, Circuit Justice, 1950).

[345] See p. 1163 *supra*.

[346] See, *e.g.*, Rosen, *Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events*, 18 J. CONSULTING PSYCHOLOGY 397, 402 (1954)

> The low incidence of suicide is in itself a major limitation in the development of an effective suicide detention device, for in the attempt to predict suicide or

diction made as to each one that he would not flee would be right ninety-seven percent of the time. The only way in which individualized prediction could improve upon this success rate would be if individualization made less than three mistakes out of every one hundred cases. This is clearly impossible in dealing with the treacherous quicksand of future human conduct, and I will note below some of the reasons why this is so. Moreover, even if a slight improvement could be achieved, for example, a reduction to only two mistakes in a hundred instead of three, it is very questionable as a practical matter that so slight an improvement would be worth the cost of processing every case individually. Individual prediction, after all, is expensive for all concerned—for the state because it requires time for adjudication and assignment of counsel; for the accused because it delays the decision as to his right to be released promptly after arrest.

All of the criteria which might be used as standards for preventive detention share this characteristic of being statistically infrequent. Probably we know least about the degree of probability that a defendant during the period of pretrial release will commit a serious crime. Here we have no data at all, but it is inconceivable that the probability is higher than five percent and more likely it is considerably lower. The other criteria noted—that the defendant will intimidate witnesses or jurors or injure a complainant—are apparently very rare, statistically well below one percent.

The foregoing probability analysis rests on a value judgment: that all mistakes in prediction are equally bad, and that it is as unfortunate mistakenly to detain *A* because of our erroneous assumption that he would flee as it is mistakingly to release *B* only to find that he will abscond. I think this is the proper value judgment to apply, for it seems to me just as important for the administration of the criminal law not to lock up an accused unnecessarily as it is not to permit a defendant to escape trial by flight. But as it seems so obvious that proceeding upon the assumption of this value judgment leads to rejection of the claim for preventive detention, I am forced to the conclusion that the advocates of preventive detention must make a different underlying value judgment. It is worthwhile, then, to examine an alternative value hypothesis.

Let us suppose that the flight of one defendant to avoid trial is regarded as a more serious occurrence than the erroneous detention of one defendant who in fact would not have fled if released. We might

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any other infrequent event, a large number of false positives are obtained (patients incorrectly classified as siucides). . . . A suicide detention device is not feasible until much more is learned about the differential characteristics of patients who commit suicide.

paraphrase but reverse another old maxim and conclude that the prevention of one flight is ten times as important to society as the prevention of one unnecessary detention. We would have to devise a different method which would allow for this weighting in an evaluation of success or failure of prediction. This could be done by assigning a score of one point for each defendant who does not flee and ten points for each one who does. Thus in our sample of one hundred cases, a perfect score would be ninety-seven points for that many defendants correctly predicted not to flee plus thirty points for three defendants correctly predicted to flee, or a total of 127 points. Applying this measure to the method of automatic release of every defendant, we see that its success rate falls sharply: it earns ninety-seven points (one for each defendant who does not flee) out of the possible total of 127 points, or only about seventy-six and one-half per cent of perfection. Thus a competing system of preventive detention which tries to do better by predicting on an individualized, case-by-case method faces odds which, while still formidable, are no longer overwhelming. An example of the most favorable kind of result we could expect from individualized prevention under ideal conditions might come out as follows: Eighty-five defendants would be predicted not to flee, of whom one in fact does flee and eighty-four do not; and fifteen defendants would be predicted to flee, of whom in fact two flee and thirteen do not. The evaluation score for this result would be eighty-four (for those correctly predicted not to flee) plus twenty (for the two cases correctly predicted to flee), a rating of nearly eighty-two per cent of perfection (104 out of the possible 127 points). Thus although the method of individualized prevention has made fourteen mistakes against only three mistakes for automatic release, we might still prefer it if we make the hypothesized value judgment that one escape is ten times as serious as one unnecessary detention.

It may be objected that the example just given is not fair to the method of individualized prevention because we have assigned it too many mistakes. On the contrary, by assuming it would make eighty-six correct judgments in one hundred cases we have given it a success rate probably higher than anything to be expected. In all areas where prediction of future human conduct has been subjected to empirical validation the results have proved to be very modest indeed. The critical part of the foregoing sentence is subjection of *all* the results to empirical validation. When we use prediction today in the criminal law, as in imposing a prison sentence instead of probation or in granting or withholding parole because of anticipated future dangerousness, the validity of the predictions made are not subjected to scientific study; instead the system conceals most of its mistakes. Thus when a judge or a psychiatrist advising him concludes that a particular defendant poses too great a risk to be released on probation, the prison sentence which the judge imposes as a result of the prediction prevents any evaluation of its accuracy. The only errors which show up—and they are ones of which judges and parole boards are made painfully aware—is where a defendant given probation or parole turns out to be dangerous. The errors on the other side of the ledger—the cases of those sent to prison as bad risks but who in fact would not have proved to be bad risks—are never identified and therefore cannot be counted. But all experience with the scientific study of prediction shows that this back side of the moon is where most of the errors will in fact occur.[347]

What causes this overprediction of a criterion, a phenomenon which has plagued all efforts at systematic prognosis of future conduct, can be better understood if we retrace our steps for a moment and put ourselves in the shoes of the judge who made the predictions of risk of flight in our last example. We hypothesized a sample of one hundred defendants and an average flight rate of three per cent. The judge's job, then, is to identify those three, and only those three. In this real and far from perfect world, the judge is faced at the outset by two fundamental limitations on his work: the inadequacy of the factual data available to him and the inadequacy of our knowledge—we simply do not know much about the human mechanics which cause three of our sample, and only three, to decide upon the desperate and probably self-defeating expedient of flight. Perhaps seventy of our defendants will be relatively easy to classify as good risks—their records will not be as bad as the others and as to each there is no special reason to think they will abscond. Another fifteen or so will be borderline—they give us a lot of trouble, but they are not as bad as the worst. As a good judge will be keenly aware of the low incidence of flight, constantly reminding himself that only three out of the one hundred are actually likely to flee, he will give these fifteen the benefit of the doubt and also classify them as good risks. There is a substantial likelihood, however, that this group of eighty-five so far granted release from detention will contain one of the three who will actually flee, an error due either to the omission of critical information from the factual record submitted to the judge or to the vast unknowns in our knowledge of human conduct. There will remain, then, fifteen defendants who will be almost indistinguishable from one another according to any of the standards which the judge might reasonably guess (because we have little tested knowledge) to be relevant to an assessment of the risk of flight. All of these fifteen will have prior criminal records, inadequate ties to the community, a sketchy employment history, and the prospect of probable conviction and a probable substantial prison sentence. Application of such standards to this group, therefore, will not help the judge to distinguish the two or three who will flee from the twelve or thirteen who, despite their equally bad records, will not. This places the judge in a dilemma [348]—and this is the dilemma of preventive detention. If he decides to select only three for detention, because he knows from the statistical probabilities that only three will actually flee, he has no method for choosing these three from the other twelve better than using a pack of cards, although he may choose to call this process intuition or otherwise mask what he is doing behind some similar label. If he decides nonetheless to try picking just three, he would avoid the error of a high rate of unnecessary detention. The trouble with this, of course, is that he is more likely than not to miss both the two remaining cases of actual flight, while to identify them both would require luck of the order needed to draw a full house in poker. So I hypothesized instead that the most reasonable thing for the judge to do would be to detain all fifteen, which gave us the results noted above. At least the judge has identified and thereby prevented two out of the three flights—a modestly successful result. If the cost of this success is that he was wrong about thirteen of the fifteen bad risks whom he detained, this is unavoidable. The only way to reduce this error would also reduce his chances of identifying even as many as two-thirds of those who in fact will flee.

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[347] See, for example, a very recent prediction study of problems closely analogous to those of pretrial preventive detention: Molof, Prediction of Future Assaultive Behavior Among Youthful Offenders (California Youth Authority, Research Rep. No. 41, 1965). An actuarial prediction instrument was applied to two samples of male first parole releases from California institutions, the first consisting of 2,060 cases and the second of 8,017. Those groups predicted to produce the highest proportions of assaultive offenders did so to a statistically significant degree, but the number of false predictions was also so high that "the prediction instruments are neither accurate nor efficient." *Id.* at 58. For example, for the score category predicted to produce and which did produce the highest proportion of assaultive offenders, only 29 out of 128 offenders so classified in one sample, and 29 out of 334 in the other, actually turned out to be assaultive offenders; all the rest were false predictions. *Id.* at 56-57, Tables 13, 15. Molof's work uses actuarial or statistical prediction techniques. An analysis of the comparative efficacy of statistical and clinical methods of prediction in twenty-seven studies in which both methods were used showed that in seventeen the statistical method was superior, in ten they were about the same, and in none was clinical prediction superior. See Meehl, Clinical v. Statistical Prediction 83-128 (1954).

Predictions by psychiatrists attempting to assess the probability of future breakdown of army inductees show similar results on evaluation. For example, Berlien studied 248 World War II inductees who fell in a class usually rejected for service as risks of becoming psychiatric casualties but who in the instance studied had been inducted. One year later 209 were still in service, 32 had been discharged, five died and two were commissioned as officers. Berlien, *Psychiatric Aspects of Military Manpower Conservation*, 111 American J. Psychiatry 91, 95, Table 4 (1954).

Other studies showing similar results are summarized by Ginzberg, The Ineffective Soldier: The Lost Divisions 167, 180-89 (1959). See especially a summary of a study by Glass based on intensive evaluation and prognosis by six psychiatrists of 505 Korean war inductees during their basic training. It was predicted that 123 were likely failures as soldiers for psychiatric reasons, but only thirty turned in unsatisfactory performance; four times as many failures were predicted as subsequently occurred. *Id.* at 187.

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[348] This problem has been beautifully analyzed by Freud:

> Even supposing that we thoroughly know the aetiological factors that decide a given result, still we know them only qualitatively, and not in their relative strength. Some of them are so weak as to become suppressed by others, and therefore do not affect the final result. But we never know beforehand which of the determining factors will prove the weaker or the stronger. We only say at the end that those which succeeded must have been the stronger. Hence it is always possible by analysis to recognize the causation with certainty, whereas a prediction of it by synthesis is impossible.

Freud, *The Psychogenesis of a Case of Homosexuality in a Woman*, in 2 COLLECTED PAPERS 227 (1959).

As the same analogy applies to other criteria of detention, it is again apparent that the critical threshold problem in an evaluation of preventive detention is the judgment of how much to weigh the mistake of allowing a defendant to flee (or commit a serious crime, or intimidate a witness) relative to the weight assigned to a mistake of unnecessary detention. Unless we choose to give the first kind of mistake much more weight, the case for preventive detention collapses and we need to proceed no further. Moreover, even if we make the alternative value judgment that unnecessary imprisonment of the untried is the much less serious error, it will be recalled that we postulated ideal conditions for our judge who, in our hypothetical, achieved eighty-two percent of perfection. In practice the judging function would be diffused, a process which could only reduce the effectiveness of prediction. As for the other ideal conditions, these include the provision of adequate factual data and no delay in achieving release for the eighty-five percent who are not to be detained. Failure to meet these ideals would, in the first instance, introduce additional sources of error, and in the second (delay), increase the cost of preventive detention in terms of its prejudice to defendants.

### *C. Fact Finding*

The method first developed by the Vera Foundation for the Manhattan Bail Project to provide a rapid method of developing certain basic factual data in the space of a few hours the morning after arrest has already been described.[349] That kind of quick check should prove to be effective for screening out the low risk cases and getting them out to pretrial release with a minimum of delay. For more difficult cases—perhaps that half or one-third of the defendant population who are not obvious candidates for immediate release under whatever standards have been adopted—presumably a more thorough factual investigation would be required.[360] How this might be accomplished within the time reasonably available may prove to be a very difficult problem. The more precise the standards for preventive detention are made, the more will be required of the prosecution to establish a case for detention, with corresponding increase in the complexity of the fact finding process.

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[349] See *Crisis in Bail: I*, at 961.

### *D. Adjudication and Review*

Today there is virtually no hearing on bail issues in the bail setting process,[361] and we have already examined the total inadequacy of existing judicial review.[362] An acid test for evaluation of proposals for preventive detention will be the procedures advanced as remedies for these defects. The principal problems will probably turn on delay, noted below, the necessary provision of counsel, and the method of adjudicating facts. Where more than a superficial fact check is required, the type of data typically provided in a presentence report is what might be desired. Note, however, that (1) the presentence report in present practice requires two or more weeks to prepare, (2) is based on the information of anonymous informants and is frequently treated as confidential by the court, and (3) presupposes guilt, so that the propriety of making this kind of investigation and report before adjudication is open to serious question. Moreover, if there is to be a meaningful appeal, it would appear that the original judge or magistrate would have to write an opinion or in some way indicate the reasons for his decision. If the appellate court receives nothing but the trial court's conclusions it will have no basis for review, being "left in a welter of assertion and counter-assertion in affidavits from which we have no adequate means of emerging." [363] Nor will review become a meaningful reality unless the standards for detention are narrowly drawn. The kinds of predictions involved in preventive detention are not easily susceptible to close control by an appellate court:

> . . . when it is a question of the application of duly recognized standards, and such application turns on what may fairly be called "facts," or on a necessarily prophetic judgment like the trustworthiness of a convicted defendant [applying

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[360] "Of course, the keynote to successful administration of any system of bail is the adequacy of the information upon which the decisions are based." Pannell v. United States, 320 F.2d 698, 702 (D.C. Cir. 1963) (Bazelon, C.J., concurring in part and dissenting in part).

[361] See *Crisis in Bail: I*, at 994.

[362] See pp. 1130-31 *supra*.

[363] United States v. Hansell, 109 F.2d 613, 614 (2d Cir. 1940) (per curiam).

> for bail pending appeal], I do not conceive it to be the function of a Circuit Justice to exercise an independent judgment as though he were sitting in the district court.[354]

### *E. Delay in Disposition*

All of the procedural difficulties suggested above come into sharp focus if attention is explicitly directed to the problem of delay. It is self-evident that time is of the essence, and the chief merit of the present bail system for those who can afford it is that it is usually able to achieve very rapid release, often without requiring of the defendant anything more than a few hours of detention. In Philadelphia, of a sample of 368 defendants who had obtained bail after it was set by a magistrate in preliminary hearing, 297 were released the same day and twenty-four more on the day next following.[355] In New York in 1961-1962, of a sample of 372 accused who eventually made bail before trial, 190 or more than half spent no time in jail.[356]

Under a system of preventive detention it is impossible to know what would happen, but the ingredients for delay exist at every step of the way. Overloaded, mass production urban courts of first instance, which have been accustomed to set the amount of bail by rote and without evidence from a schedule of bail amounts by crimes, will have to hold real hearings, to wait for the facts, to wait for defense counsel, and to wait for the prosecution to present its evidence. How fast can a judicial system work with this kind of problem? Three examples from other areas of current criminal procedure hardly permit a favorable prognosis.

The first is the administration of habeas corpus, where the urgency of achieving a speedy disposition is the very history of the development of the great writ. The landmark English statute of 1679 is replete with time limits upon judges and others, with penalties for their violation.[357] Some of these controls against delay found their way into our federal statutory provisions.[358] Current federal procedure requires that the judge, unless the petition is invalid on its face, "forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted . . . ."[359] In either event, respondent is to file a return within three days and a hearing on the merits is to follow within five more days. It is significant that even under this ideal procedure eight days is felt to be required, and even more significant that in practice final disposition after hearing is probably almost never achieved within the eight-day limit. The statute itself permits additional time for "good cause" at both the return and hearing stages. Moreover, the rule-to-show-cause device, which was judicially created and finally authorized by statute in 1948,[360] serves as "a dilatory plea or demurrer."[361] As federal courts "appear almost invariably to issue the rule and not the writ,"[362] and as there will frequently be a hearing on the rule to show cause before the writ issues and the case then moves to a hearing on the merits, the typical result is a three, rather than a two, stage procedure, with ample opportunities for delay all along the line. In practice, too, it is likely that extensions of time are the rule rather than the exception apparently envisaged by the statute[363] and certainly by the history of the writ. While a broadly based empirical investigation of the administration of habeas corpus in both federal and state preconviction and postconviction practice is needed, it seems probable that delay is also typical in state administration of the writ.[364]

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[354] Ward v. United States, 76 Sup. Ct. 1063, 1066 (Frankfurter, Circuit Justice, 1956). In this case, involving bail pending appeal, Justice Frankfurter was apparently precluded from any significant appellate function.

> [T]he District Judge felt that the likelihood of flight was a danger not to be disregarded. I cannot reject this conclusion of the District Court because it was based on confidential probation reports. . . . Such a judgment is, to be sure, a prophecy but I cannot sit as the district judge and make my own.

*Ibid.*

Compare United States v. Williams, 253 F.2d 144, 146 (7th Cir. 1958), where the court complains of the "meager record" brought up for review. The district court gave no reasons for denial of bail, but the court of appeals, denying bail though remanding for new hearing, said that "We can assume that he had a confidential probation report before him . . . ." *Id.* at 148.

[355] *Philadelphia Bail Study* 1044 n.52.

[356] Rankin 643 n.6.

[357] 31 Charles 2, ch. 2.

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[358] Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81, as amended, REV. STAT. §§ 751-53 (1875).

[359] 28 U.S.C. § 2243 (1958). In habeas corpus procedure, of course, issuance of the writ is not a disposition of the petition but merely moves the case to a hearing on the merits. For a prisoner to win, he must be granted the writ and then obtain an order for discharge.

[360] Act of June 25, 1948, ch. 646, § 2243, 62 Stat. 869 (now 28 U.S.C. § 2243 (1958)).

[361] Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179, 187 (1949).

[362] AMSTERDAM, THE DEFENSIVE TRANSFER OF CIVIL RIGHTS LITIGATION FROM STATE TO FEDERAL COURTS 389 (1965).

[363] A study of sixty habeas corpus petitions filed in the United States District Court for the Eastern District of Pennsylvania in 1963 showed a time sequence for ten of the cases that reached the stage of issuance of a rule to show cause. The time set for the return was thirty days in one case, twenty in a second, and the average of the remaining eight was nine days; in only two cases was the respondent directed to answer in the statutory three days. Weiser, An Analysis of the Petitions for Writ of Habeas Corpus Filed in U.S. District Court for the Eastern District of Pennsylvania by the State Prisoner, February 1964, p. 12 (unpublished paper in Biddle Law Library, University of Pennsylvania Law School). See also Dorsey v. Gill, 148 F.2d 857, 865-66 (D.C. Cir. 1945) (listing ten alternative procedures for handling habeas corpus petitions, most of which will delay a disposition on the merits).

> The simile of the procedure for and upon the great writ to the behavior of Proteus is not strained. Just as the suppliant of Proteus has to lay firm hold on him and cling sturdily until he ceased his apparitional antics . . . ; so must the applicant for habeas corpus . . . . [be] steadfast and persistent . . . .

Longsdorf, *supra* note 361, at 192.

The second example is the administration of the preliminary hearing, which is designed as a control against unjustifiable arrest and detention. If the hearing is to perform its important exculpatory and protective function, it should follow arrest as promptly as possible. But if it does come quickly after arrest, one study has found that it tends to be superficial and protects the defendant "against only egregious police error. The principal objection to a more probing preliminary hearing is that anything more than a superficial showing of probable cause places an unrealistic burden upon police . . . ."[365] in the time available. It is common knowledge that, in practice, the hearing frequently or usually is continued, and the federal rules provide that, whereas the appearance before the commissioner for notification to the accused of his rights must be "without unnecessary delay,"[366] the hearing shall occur "within a reasonable time."[367] Where defendant has to obtain or be provided with counsel, delay is probably necessary, and counsel for prosecution frequently ask for a continuance. The continuance practice is subject to great abuse, defendants may be subject to pressure to waive the hearing entirely, and the principle of a prompt independent judicial check on arrests is impaired.

Third, a careful study of the efficacy of appellate review of denial of bail pending appeal under the discretionary standards now applied in the federal courts should give us data valuable for our present purposes.[368] This federal system is probably the closest existing analogue to proposals for preventive detention. To the extent that published reports give information about the time required to process an appeal from denial of bail they suggest that delays from a few days to up to a week are routine,[869] that much longer delays are frequent,[870] and that a very common tactic is for the appellate court, instead of deciding yes or no on the right to bail, to remand the case back to the district court for further hearing—a procedure sure to entail added delay.[871] Judge Yankwich has reported the history of five cases in Los Angeles where to appeal a denial of bail "[all] you had to do was to find a [circuit] judge on the Sixteenth Floor of the same building . . . ."[872] The interval in days elapsing between the denial of the appeal in these cases in the district court and the filing in the district court of the appellate order to release on bail was: four days, ten days, fifteen days, seventeen days and thirty-two days.[873]

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[364] Thus in Philadelphia, where the statute gives the district attorney up to twenty days to make his return on an order to show cause, PA. STAT. ANN. tit. 12, § 1904 (1951), after which the case must be listed, the delay between petition and hearing is routinely at least two weeks. Letter From Herman I. Pollock, Defender Association of Philadelphia, to the Author, May 13, 1965.

[365] Note, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. PA. L. REV. 589, 606 (1958).

[366] FED. R. CRIM. P. 5(a).

[367] FED. R. CRIM. P. 5(c). Compare PA. R. CRIM. P. 116, which formally distinguishes between an informative "preliminary arraignment" and a later "preliminary hearing" which shall occur "not less than three nor more than ten days" later "unless extended for cause shown . . . ." For an attempt to limit the period of delay, see ALI CODE OF CRIMINAL PROCEDURE § 43 (1931) (no single postponement for more than two days, and all postponements combined not to exceed six days).

[368] See FED. R. CRIM. P. 46(a)(2): "Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay." For the purpose of this rule "frivolous" has the same meaning as not taken in "good faith" for the purposes of 28 U.S.C. § 1915 (1958) (proceedings in forma pauperis). According to Ellis v. United States, 356 U.S. 674, 675 (1958) (per curiam), not taken in "good faith" and "frivolous" mean issues "so frivolous that the appeal would be dismissed in the case of a nonindigent litigant . . . ." For the application of this doctrine in bail cases see, *e.g.*, Barnard v. United States, 309 F.2d 691 (9th Cir. 1962).

The use of the word "may" in Federal Rule of Criminal Procedure 46(a)(2) has been construed to permit the court to deny bail even if the appeal is not frivolous or taken for delay. See Ward v. United States, 76 Sup. Ct. 1063 (Frankfurter, Circuit Justice, 1956).

Taken together, experience with these comparable proceedings gives no reason for optimism that it would be possible to develop procedures for adequate hearing on preventive detention and administer them with sufficient dispatch to avoid serious complications. The volume of cases, the low calibre of judicial officers typically assigned at this stage of proceedings, and the added complication of having to build in some method of expeditious review all indicate that it would be administratively impossible to create a system that for many defendants, who would be promptly bailed today and would ultimately achieve release under preventive detention, would avoid some days of detention before the right to pretrial release could be adjudicated. It is worth recalling that our hypothetical defendant was fired from his job after failing to show up on two successive days. Pretrial detention is a situation where it is particularly true that justice delayed is justice denied.

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[869] *E.g.*, Timmons v. United States, 343 F.2d 310 (D.C. Cir. 1965) (per curiam) (appeal against denial of bail argued January 5, decided January 28); United States v. Galente, 290 F.2d 908 (2d Cir. 1961) (per curiam) (appeal on bail filed May 18, argued May 23 and denied June 1, in case where twenty day contempt sentence was running); United States v. Esters, 161 F. Supp. 203 (W.D. Ark.), *aff'd*, 255 F.2d 63 (8th Cir. 1958) (per curiam) (bail denied in district court April 12, appeal decided April 29). Of course the overwhelming majority of appellate court decisions in bail cases are probably not reported, and an empirical study of time taken in these unreported decisions would be useful.

[870] For particularly egregious examples see the history of the *Bandy* case, note 274 *supra*, and the long litigation involving bail for one Sica. Sica, along with his co-defendant Carbo, was engaged in repeated appeals in the federal courts before his conviction was finally upheld on the merits *sub nom.* Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). In February, 1961 Sica's bail was revoked during his trial; the revocation was reversed, 288 F.2d 282 (9th Cir.), *cert. denied*, 365 U.S. 861 (1961); on remand bail was denied on new grounds and this affirmed, 288 F.2d 686 (9th Cir. 1961). After conviction on May 30 and sentence on December 2, Sica continued in jail, the district court denying bail pending appeal on grounds that his release would endanger government witnesses. The court of appeals remanded the denial of bail on January 22, 1962, holding that potential harm to witnesses was not justification for denying bail pending appeal. 300 F.2d 889 (9th Cir. 1962). The district court again refused release, resting denial on the ground that bail would not be a sufficient deterrent to flight. The court of appeals affirmed on February 13, 302 F.2d 456 (9th Cir. 1962) (per curiam), although the court decided that it would be "appropriate that the appeals be expedited." *Id.* at 457. Thirteen months after bail was first denied Sica obtained an order for bail from Justice Douglas. 82 Sup. Ct. 669 (Douglas, Circuit Justice, 1962); *cf.* Carbo v. United States, 82 Sup. Ct. 662 (Douglas, Circuit Justice), *application for review denied*, 369 U.S. 868 (1962) (denying release to Sica's codefendant). The "expedited" appeal was decided after another year, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). The case is an apt illustration of the kind of procedural runaround made possible by ill-defined standards for denial of bail, and is the more significant because Sica had highly skilled counsel throughout these proceedings.

[871] *E.g.*, Hairston v. United States, 343 F.2d 313 (D.C. Cir. 1965) (per curiam) (applied to court of appeals for reduction of bail on December 5, district court ordered to file opinion explaining setting of high bail and opinion filed December 31, decided February 2).

[872] Yankwich, *Release on Bond by Trial and Appellate Courts*, 7 F.R.D. 271, 277, 278-79 (1948).

[873] *Id.* at 278-79.

## V. Conclusion

1. From the analysis of equal protection I conclude that extension of the *Griffin* rule to bail is particularly appropriate, and that pretrial detention of an accused who would go free but for differences in financial circumstances is a violation of the equal protection clause. As is now required with appeals, the government should be required to control the problems of the pretrial period by methods which do not result in invidious distinctions in the treatment of rich and poor.

2. From the analysis of the eighth amendment the only interpretation which seems to me consistent with its historical antecedents and what must have been its purpose is to find in it protection from pretrial detention which is secured against abridgment by legislation or the vagaries of judicial discretion. The words "excessive bail" in the amendment must be given an interpretation consistent with the *Griffin* rule as forbidding any financial discrimination against the accused. Such an interpretation pierces the literal guarantee and focuses upon the fundamental interests with which the amendment is concerned: the right not to be punished before conviction and the right not to be prejudiced in preparing for trial. These were the ends; a financial bonding system was merely a means, perhaps suited to an earlier age, but at any rate now obsolete and offensive to current values.[374] The concept of excessiveness would continue to be pertinent as a check against the imposition of unjustifiably onerous conditions of pretrial release.

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[374] Compare the judicial response to the new morality implicit in changing concepts of race relations: "In approaching this problem, we cannot turn the clock back to 1868 when the [fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." Brown v. Board of Education, 347 U.S. 483, 492-93 (1954).

Construed as embodying the fundamental protection of the accused during preconviction procedure, the amendment is restored to the role it must have been intended to fill as a part of the basic charter of our liberties. Those parts of the Bill of Rights which are today interesting only as historical curiosities—for example the third amendment on quartering soldiers—have become relics because the subjects with which they dealt are no longer problems. But the eighth amendment does not deserve such a fate, for the issues with which it is concerned are as alive and important today as in 1789. Where we have a specific provision which, given a reasonable interpretation, deals satisfactorily with today's manifestations of the problem concerned, it seems far better to use that provision than to load pretrial detention problems upon the already overburdened and not very secure shoulders of due process.[375]

An eighth amendment given its proper role as an integral and important part of our basic rights should also be incorporated in the fourteenth amendment and made applicable to the states. Indeed, I have assumed throughout that such incorporation exists, although the question has not been authoritatively decided.[376] Other collateral problems would then have to be resolved, for example, the express exception historically provided for capital cases and possible application of the amendment to bail after conviction pending appeal.[377] The first problem contains difficult questions at a time when offenses declared capital by legislation remain common but the actual imposition of the death penalty is declining rapidly. The appeal problem is simpler and the proper answer seems to me self-evident. The question did not arise when the rights embodied in the eighth amendment were being forged simply because "the criminal appeal can be regarded almost [as] a modern innovation" which was "very largely a product of the nineteenth century."[378] As appeal has now become an integral part of the judicial process in criminal cases, the same constitutional protection should be applied pending appellate disposition as prior to conviction, a result dictated not only by the logic of the eighth amendment, but also by unsatisfactory experience with discretionary power to deny bail pending appeal.

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[375] Compare Mr. Justice Black's protest in Rochin v. California, 342 U.S. 165, 177 (1952) (concurring opinion): "Of even graver concern, however, is the use of the [due process] philosophy to nullify the Bill of Rights. I long ago concluded that the accordian-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights."

[376] Collins v. Johnston, 237 U.S. 502 (1915), which held that the eighth amendment did not apply to the states was a cruel and unusual punishment case and on that clause was overruled (without being cited) by Robinson v. California, 370 U.S. 660 (1962). Recent cases in dictum and without authority have assumed incorporation of the excessive bail clause in the fourteenth amendment. Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); Dye v. Cox, 125 F. Supp. 714, 715 (E.D. Va. 1954) (incorporation assumed); People *ex rel.* Schildhaus v. Warden, 37 Misc. 2d 660, 672, 235 N.Y.S.2d 531, 546 (Sup. Ct. 1962). The most recent examples of the march to incorporate the Bill of Rights in the fourteenth amendment are Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right of confrontation applies to states); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment guarantee against self-incrimination applies to the states); *cf.* Griffin v. California, 85 Sup. Ct. 1229 (1965).

[377] I intend to examine these questions in a subsequent article.

3. From the analysis of the very substantial prejudice which results from pretrial detention contrasted with the at best conjectural value of the bail system in supporting the incidence of appearance for trial, I conclude that detention is consistent with the due process demand of fundamental fairness only in situations of extraordinary risk. In most cases, if whatever security bail may provide were removed, no alternative protection against absconding would be required beyond the provision of sanctions for wilful flight and existing knowledge by the accused that flight will prejudice him at sentencing.

In high risk cases alternatives available to the government should suffice to provide for essential public interests. These alternatives include speedy trial at the discretion of the government, with the possibility of detention as a sanction for unjustifiable delaying tactics by the defendant; probation control over the accused, daily reporting to the police or restrictions on travel; and discretion to detain an accused who has absconded in the instant or in a prior recent case (perhaps within five years). Only where the government can establish that release would create a high risk of violent injury to a specific victim, complainant, or witness should detention be permitted as a preventive measure. Even then detention should be contingent upon a speedy trial, and conditions of confinement should permit defendants to communicate freely with counsel, family and friends, and provide them with a standard of living substantially better than that of sentenced prisoners. Default by the government in meeting these conditions in any case should abrogate its privilege to detain.

4. The analysis of preventive detention leads me to its rejection except in the very limited situation just noted. If my constitutional analysis is accepted, this result is compelled; but even if preventive detention is held not to be constitutionally proscribed, it should be rejected on policy grounds. The addition of the label "preventive" does not cleanse detention of its vices: pretrial punishment and impairment of a fair trial. The overwhelming objection to such detention is that the kinds of precise prediction of future conduct which it requires can-

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[378] Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. Chi. L. Rev. 151, 154 (1957).

not be made with significant reliability even under the best of fact finding and diagnostic circumstances. As it would have to be administered on a mass scale before the lowest level judiciary with no practical possibility of fast and effective appellate review, it would deteriorate into the worst kind of uncontrolled discretion.

The impossibility of individualized preventive prediction in this area and the statistical demonstration that the least number of mistakes will be made by releasing everyone is a convincing modern vindication of the wisdom of the absolute right to bail which has been an important part of our history since the Massachusetts Body of Liberties in 1641.

5. As for the hypothetical defendant, he should be released on recognizance pending his trial. Even if he is in fact innocent, he may be unable to find his witnesses, or get them to testify, or if they take the stand the jury may refuse to believe them. But a system of justice which is inevitably going to make some mistakes should have an easier conscience if it has given him at least this much chance to defend himself.

It is also quite possible that the defendant's alibi and his witnesses may be nothing more than figments of a lying imagination. In this event, if he is released he may try to manufacture witnesses and produce a perjured defense. He may, in the common usage which reveals the extent of our prejudgment, "repeat his crime." Or he may abscond, either because he knows he is guilty or because he knows he is innocent but doubts that a jury could be so persuaded. Still another conceivable, if unlikely, result is that he would abuse pretrial freedom by doing harm to the informer, Inman, against whom he has expressed some resentment.

The weighing of such imponderables, whose probability cannot be determined, against the possibility of injustice to the accused, a risk whose magnitude is unknown, poses for adjudication on an individual case-by-case basis an impossible task. For the class of accused criminals of which the hypothetical defendant is a member, however, we either know or could discover what these probabilities are. On the one hand, perhaps a quarter of defendants like him will not be convicted; on the other hand, fair estimates are that the statistical incidence of attempted flight followed by ultimate rearrest is small, of permanently successful escape far smaller, and of the other risks, so small as to be statistically insignificant. The genius of specifically enumerated Bill of Rights guarantees such as the eighth amendment is that they make policy equally applicable to all members of a class, instead of succumbing to the seductive delusion that by prediction in individual cases one can reduce the total number of errors.

6. At first blush there appear to be substantial disadvantages for the government in the position which is here taken both as constitutional exegesis and as the wisest resolution of the bail problem. In the long run, however, my conclusion is that the government's administration of criminal law is less likely to be harmed than benefited from the abolition of pretrial detention.

The possible losses are immediately apparent. To an unknown but perhaps significant extent the government would be deprived of some advantages it now derives from pretrial detention, for example, detention's contribution to the present high rate of guilty pleas, or the government's superior negotiating position in plea bargaining with jailed defendants. Such advantages, however, are illegitimate and are exacted in a discriminatory fashion only from the poor. If there were to be a significant decrease in the proportion of guilty pleas and a corresponding increase in the proportion of those going to trial, a problem with which we are already familiar as a result of provision of assistance of counsel for all defendants, the pressure for additional facilities to deal with criminal administration would increase. But there is no escape from the fact that more equal justice for the indigent is going to impose new and heavy burdens on the state.

Such burdens can, however, have advantages as well. Increased pressure might promote greater efficiency in prosecution, especially in early screening of cases. It might speed the urgently needed reexamination of the role of the criminal law in conjunction with possibly increased reliance on other noncriminal sanctions and controls. Every stage of the criminal process from the police lockup to the penitentiary is now loaded with unnecessary cases: for example, we use arrest where summons would suffice, fail to screen out cases efficiently early in the prosecution process, fail fully to utilize probation and parole, and apply criminal sanctions where they are inappropriate or unnecessary. Thus Packer has persuasively argued that the time has come "to reexamine the uses now being made of the criminal sanction with a view toward deciding which uses are relatively indispensible and which might with safety (and perhaps even with some net gain to the public welfare) be restricted or relinquished."[379]

Very sharp curtailment of pretrial detention would bring many compensating advantages, for example, vast savings in present high detention costs, reduced exposure to county jail life (aptly characterized as training in crime), and probably an increased incidence of probation as previously detained defendants would be in a better position to qualify for it. More subtle, but perhaps even more significant, would be a change in the image the law presents to the economically depressed levels of our population. Equal justice should be more than charity for the poor; it should build that respect for law which in the last analysis is the only secure foundation for effective enforcement.

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[379] Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 67 (1964).

If these conclusions about bail appear to be strong medicine, disrupting the familiar and entailing risks which are probably magnified in our imagination because they are unknown, then to that extent the bail crisis will force us to probe again what we really mean by due process and equal justice. It will also test the quality of our democracy, for, as has been repeatedly observed, a revealing measure of any civilization is found in its treatment of citizens accused of crime and—I would add—of those crippled by poverty in the adversary struggle with the state.

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# BAIL REFORM AND THE CONSTITUTIONALITY OF PRETRIAL DETENTION

*The Honorable John N. Mitchell*[*]

ON January 31, 1969, President Nixon, in his first public statement on crime control, called for legislation to permit "temporary pretrial detention" of criminal defendants whose "pretrial release presents a clear danger to the community." [1] Pursuant to the President's directive, the Department of Justice sent to the Congress, on July 11, 1969, a proposal[2] amending the Bail Reform Act of 1966[3] which would, *inter alia,* permit the federal courts to detain up to 60 days prior to trial those criminal defendants who are charged with certain crimes of violence; whose release, even with conditions imposed, would constitute a danger to the community; and who have been afforded a hearing with appropriate procedural safeguards. For criminal defendants not detained prior to trial, the proposal would authorize courts to consider the defendant's potential dangerousness to the community in determining and setting conditions of pretrial release.[4] Furthermore, new sanctions are provided for violations of conditions of release, for bail jumping and for crimes committed while on release.[5]

The question of pretrial detention raises issues of constitutional dimension; such detention has been challenged on the grounds that it violates the eighth amendment,[6] the presumption of innocence[7] and

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[*] Attorney General of the United States. LL.B., 1938, Fordham University. The Attorney General gratefully acknowledges the assistance of Associate Deputy Attorney General Donald E. Santarelli and Earl J. Silbert and James L. Kelley of the Department of Justice in the preparation of this Article.

[1] 27 CONG. Q. WEEKLY REP. 238 (Feb. 7, 1969).

[2] S. 2600, 91st Cong., 1st Sess. (1969). For the text of the bill and an explanation of the various provisions, see 115 CONG. REC. S7906-11 (daily ed. July 11, 1969). *See also* 27 CONG. Q. WEEKLY REP. 1270 (July 18, 1969).

[3] 18 U.S.C. §§ 3146-52 (Supp. IV, 1968).

[4] *See* S. 2600, 91st Cong., 1st Sess. § 1(c) (1969).

[5] *Id.* §§ 5, 6.

[6] See text at notes 9-36 *infra.*

[7] See text at notes 37-38 *infra.*

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the due process clause of the fifth amendment.[8] This Article will analyze these issues and set forth a constitutional basis for the proposal.

## EIGHTH AMENDMENT

The only provision of the Constitution which specifically mentions bail is the eighth amendment.[9] Its language, which does not expressly grant or deny the right to bail, is susceptible of two interpretations. First, because the amendment does not provide for denial of bail, it can be construed to require the setting of bail in all cases with the proviso that it never be excessive. Second, because the amendment does not specifically grant the right to bail, it can be construed to mean only that bail shall not be excessive in those cases in which it is proper and that the setting of no bail in certain cases is not excessive. While the first of these two interpretations would prohibit pretrial detention of criminal defendants, the second would not.

To resolve the ambiguity of the abbreviated language of the eighth amendment, it is necessary to examine the historical context in which it was adopted in 1791 on the assumption that those concerned with drafting and ratifying the amendment generally intended to conform the law to contemporary practices. The only Supreme Court opinion which discusses the history of the eighth amendment and its application to the right to bail clearly adopts the interpretation which permits denial of bail prior to trial in some situations. In *Carlson v. Landon*,[10] the Court stated:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases

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[8] See text at notes 39-75 *infra*.

[9] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

[10] 342 U.S. 524 (1952).

> bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.[11]

The conclusion that a constitutional prohibition of excessive bail does not, in itself, establish a right to bail has been followed by other courts.[12]

The Supreme Court's brief historical analysis of the eighth amendment in *Carlson v. Landon* and its statement that "[t]he Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country" [13] are supported by a more detailed examination of the federal and state bail and penal statutes existing at the end of the 18th century. This examination establishes beyond question that persons charged with serious felonies—those which posed a substantial danger of injury or death to others—were not entitled to bail when the eighth amendment was adopted, nor for a substantial period of time thereafter. Moreover, it is reasonable to conclude that anticipated danger to other persons or the community was a substantial motivating factor in legislative decisions to make bail unavailable to certain classes of dangerous offenders. Indeed, in a case involving the attempted assassination of President Andrew Jackson by an allegedly insane man in 1835, an offense punishable at that time only as a misdemeanor, the court observed that "the discretion of the magistrate in taking bail in a criminal case, is to be guided [in part] by . . . the atrocity of the offense." [14]

The prevalent bail practice when the amendment was proposed by the First Congress without floor debate in 1789,[15] and ratified by the states in 1791, was denial of bail in death cases. The federal bail statute of 1789,[16] which authorized discretionary denial of bail in all capital cases, was similar to and frequently more liberal in this respect than state bail enactments. Eleven of the thirteen original states enacted bail statutes between 1780 and 1801.[17] The statutes in six of these states—Delaware, Maryland, New Jersey, North Carolina, Pennsylvania and South Carolina—denied bail automatically in capital cases.[18] During the same period, only Connecticut, Massachusetts, New York and Virginia granted a right to bail in capital cases, with certain safeguards—for example, in Massachusetts bail was permitted in all cases but only when authorized by a Judge of the Supreme Judicial Court.[19] It is noteworthy that North Carolina, which had allowed bail for all

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[11] *Id.* at 545-46.

[12] *E.g.*, Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498 (1943); *see* Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822 (1906) (dictum).

[13] 342 U.S. at 545.

[14] United States v. Lawrence, 26 F. Cas. 887, 888 (No. 15,577) (C.C.D.C. 1835).

[15] *See* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 971-72 (1965).

[16] Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91. See note 17 *infra*.

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[17]

BAIL STATUTES: 1780-1801

| *Jurisdiction* | *Bail Possible in all cases except:* | *Other Limitations:* |
|---|---|---|
| Conn. (1786) | no exceptions | bail allowed in high treason cases only by court having jurisdiction |
| Del. (1797) | "felonies of death" | none |
| Ga. (1801) | horse theft (felony punished by death) | none |
| Md. (1692-1839) | felony or treason | none |
| Mass. (1780-1807) | no exceptions | bail allowed only by Judges of Supreme Judicial Court |
| N.J. (1800) | treason or "felony of death" | none |
| N.Y. (1792) | no exceptions | Justices must investigate whether party committed the felony before release on bail |
| N.C. (1792) | There are some nonbailable offenses; one statute refers to English law for these. Murder and felonies are bailable only by two judges in open session after investigating whether defendant committed the crime. No bail for capital offenses in 1801. | |
| Pa. (1781-90) | treason or felony | bail allowed for robbery, burglary, sodomy and buggery only by Supreme Court judge |
| S.C. (1790) | treason or felony (unless defendant is not indicted within 1 term of the Court) | none |
| Va. (1792-95) | no exceptions | none |
| Federal (1789) | capital cases except by Supreme Court or Circuit Court | none |

Prepared by the Department of Justice.

[18] See note 17 *supra*.

[19] LAWS OF MASS. vol. 1, at 238, § 2 (1807). See note 17 *supra*.

offenses in 1792, made all capital offenses nonbailable in 1801.[20] Authority to deny bail in capital cases remains the general pattern throughout the United States today.[21]

This pervasive practice of denial of bail in capital cases when the eighth amendment was ratified in 1791 is particularly significant because at that time the great majority of criminal offenses involving a threat of serious physical injury or death to the victim were punishable by death under state laws. The same pattern prevailed in federal law to the limited extent that federal criminal statutes were deemed necessary at that time. In addition to murder, capital punishment was imposed for rape, arson, burglary and robbery in Connecticut, Delaware, Massachusetts, New Hampshire, New York and Rhode Island.[22] In Mary-

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[20] See note 17 *supra*.

[21] *See, e.g.*, CAL. PENAL CODE § 1270 (West 1956); ILL. CONST. art. 2, § 7; MASS. GEN. LAWS ANN. ch. 276, § 20D (1959); MICH. COMP. LAWS § 765.5 (1968); N.Y. CODE CRIM. PROC. § 552 (McKinney Supp. 1969); OHIO CONST. art. 1, § 9; OKLA. STAT. ANN. tit. 22, §§ 1101-02 (1951); PA. CONST. art. 1, § 14; 3 R.I. GEN. LAWS ANN. § 12-13-5 (1957); VA. CODE ANN. § 19.1-66 (1960); FED. R. CRIM. P. 46(a)(1).

[22] TABLE OF CAPITAL OFFENSES

| *Jurisdiction* | *Rape** | *Arson* | *Burglary* | *Robbery* |
|---|---|---|---|---|
| Conn. (1786) | death | (of dwelling house) death | death | death |
| Conn. (1796) | death | prison | prison | prison |
| Del. (1797) | treated as felony | (of home) death | death | treated as felony |
| Md. (1809) | death (1744) | death | prison | prison |
| Mass. (1785) | death | (of home at night) death | (at night) death | death (1805) |
| N.H. (1792) | death | (at night) death | death | death |
| N.Y. (1785-88) | death | (of dwelling house) death | death | death |
| Pa. (1790-94)† | prison | prison | prison or forfeiture of property** | prison or forfeiture of property** |
| R.I. (1798) | death | death | death | death |

* May include statutory rape.

** One convicted of burglary or robbery in Pennsylvania could be admitted to bail only at the discretion of a Supreme Court Judge.

† In 1794 death penalty authorized only for murder.

land, the death penalty was imposed for rape and arson, while South Carolina defined rape, arson and burglary as capital offenses.[23] Furthermore, such offenses as sodomy, mayhem and manslaughter were punishable by death in several states.[24] Georgia, New Jersey and North

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| *Jurisdiction* | *Rape** | *Arson* | *Burglary* | *Robbery* |
|---|---|---|---|---|
| S.C. (1790) | death | (of wood frames for house construction) death | death | (of bond, warrant, will, or note) punishment same as for theft of goods themselves |
| Va. (1792-95)†† | death | (of house) death | prison & restoration of goods (1796-1802) | prison & restoration of goods (1796-1802) |

* May include statutory rape.

†† In 1796 death penalty eliminated except for first degree murder.
Prepared by the Department of Justice.

[23] See note 22 *supra*.

[24] Crimes and Punishments

| *Juris.* | *Bestiality* | *Buggery* | *Sodomy* | *Mayhem* | *Kidnapping* | *Manslaughter* |
|---|---|---|---|---|---|---|
| Conn. (1787) | death | | death except where one party was under 15 or colored | death | (of Negroes) fine (1788) | forfeiture of goods, whipping, & branding with M |
| Del. (1797) | treated as felony —death | treated as felony —death | treated as felony —death | treated as felony —death | (of Negroes) whipping & ears cut off | treated as felony —death |
| Ga. (1801) | | | | fine or pillory, 2d offense —death | | |
| Md. (1809) | | | maximum 10 yr. prison term | maximum 10 yr. prison term | (of Negroes) maximum 10 yr. prison term | maximum 10 yr. prison term |
| Mass. (1785) | death | | death | maximum 10 yr. prison term (1805) | | maximum 1 yr. prison term, stand on gallows 1 yr., brand with M |

Carolina, which had not enacted penal codes, entrusted the formulation of criminal laws and penalties to the courts in accordance with the common law which imposed capital punishment for most felonies.[25]

Although the death penalty typically applies to only a limited range of serious offenses today, and has been abolished entirely in eight states,[26]

| *Juris.* | *Bestiality* | *Buggery* | *Sodomy* | *Mayhem* | *Kidnapping* | *Manslaughter* |
|---|---|---|---|---|---|---|
| N.H. (1792) | death | | death | fine or 7 yr. maximum prison term | | gallows, fine &/or prison |
| N.Y. (1792) | death | death | | death | | |
| N.C. (1792) | | punished as in England —death | | fine & prison (1801) | | death |
| Pa. (1790) | | prison & forfeiture of lands | prison & forfeiture of lands | maximum 10 yr. prison term | (of Negroes) fine | prison |
| S.C. | | death or forfeiture | | treated as felony —death | (of slaves) death | treated as felony —death |
| Va. | | death | | treated as felony —death | (of slaves) death | |

Prepared by the Department of Justice

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[25] 4 W. Blackstone, Commentaries *98, 216, 222; R. Perkins, Criminal Law 10-11 (2d ed. 1969).

[26] 2 Alaska Stat. § 11.15.010 (1962); Iowa Code Ann. § 690.2 (Supp. 1969); 9 Me. Rev. Stat. Ann. tit. 17, § 2651 (1964); Mich. Stat. Ann. § 750.316 (1968); Minn. Stat. Ann. § 609.185 (1964); 1 Ore. Rev. Stat. § 163.010 (1967); W. Va. Code Ann. § 61-2-2 (1966); Wis. Stat. Ann. § 940.01 (1958).

In North Dakota the death penalty has been abolished except for murder committed while under a previous sentence for murder. 2 N.D. Cent. Code § 12-27-13 (1960). Vermont allows capital punishment only on a second unrelated murder or the killing of a peace officer or prison official. 5 Vt. Stat. Ann. tit. 13, § 2303 (Supp. 1969). New York permits the imposition of the death penalty only for the second conviction of murder or the murder of a peace officer. N.Y. Penal Law § 125.30 (McKinney 1967). California and Georgia do not impose the death penalty for murders committed by minors. 10 Ga. Code Ann. § 26-1005 (Supp. 1968) (under 17 years); Cal. Penal Code § 190.1 (West Supp. 1968) (under 18 years).

For a discussion of the state statutes, see Witherspoon v. Illinois, 391 U.S. 510, 525-28 nn. 2-8 (1968) (concurring opinion).

the widespread impact of the movement to abolish capital punishment has been relatively recent.[27] By the end of 1958, more than a century and a half after ratification of the eighth amendment, capital punishment was still authorized for murder in forty-four states,[28] rape in twenty-one states, arson in four states, burglary in three states and robbery in eleven states.[29] Federal law prescribes the discretionary use of the death penalty for murder, kidnapping, treason, espionage and rape.[30]

The considerations which have led to the gradual repeal of the death penalty—primarily rehabilitative efforts in corrections, doubts concerning the deterrent effect of capital punishment and a felt disproportion between the punishment and the crime—are largely irrelevant to the question whether a defendant should be detained pending trial. Whatever the merits of these considerations with respect to the death penalty, they have little bearing on human propensities for dangerous conduct during the period between arrest and trial. As a class, persons held to answer for such dangerous offenses as robbery, rape or burglary if released pending trial pose as great a danger to the community today as they did in 1791. Accordingly, since the eighth amendment when adopted clearly permitted pretrial detention for capital crimes because of danger to the community, it should not today prohibit pretrial detention for such dangerous crimes merely because they are no longer capital for reasons completely unrelated to their dangerousness.

Case precedent and history, therefore, belie the contention that the eighth amendment grants a right to pretrial release in all criminal cases, or even in all noncapital cases. When the language of the amendment is analyzed in the historical context in which it was adopted, its ambiguity must be resolved, as in *Carlson v. Landon*,[31] in favor of the interpretation that although bail may never be excessive, there is no absolute right to bail.

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[27] *See* President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 27-28 (1967); T. Sellin, Capital Punishment (1967); T. Sellin, The Death Penalty (1959); Royal Commission on Capital Punishment 1949-1953, Report (1953).

[28] T. Sellin, The Death Penalty 1 (1959).

[29] *Id.* at 4.

[30] 18 U.S.C. § 1114 (Supp. III, 1968); *id.* § 1111 (1964) (murder of a federal official); *id.* § 1201 (kidnapping); *id.* § 794 (espionage); *id.* § 2381 (treason); *id.* § 2031 (rape).
A recent act makes an attempted assassination or kidnapping of the President or Vice President of the United States a capital crime. *Id.* § 1751 (Supp. III, 1968).

[31] 342 U.S. 524 (1952). See text at notes 9-13 *supra*.

Denial of pretrial release for serious crimes, moreover, is consistent with the practice in other countries—for example, Sweden, Norway, Denmark and West Germany deny pretrial release as a matter of course, because of the danger to society and the risk of flight.[32] More importantly, in England, the source and foundation of the development of our system of law, the English Bill of Rights did not grant "a right to bail in all cases." [33] Prior to 1789, bail was either not authorized or within the discretion of English courts in serious felony cases.[34] Even after the adoption of the eighth amendment in the United States, England has continued to grant discretion to its judges and magistrates to deny pretrial release to offenders charged with felonies or, in some circumstances, with misdemeanors.[35] Indeed, in 1955 the Criminal Court of Appeals stated that persons with a past record of convictions were not to be released prior to trial "unless the magistrates think that there is a real doubt as to . . . guilt." [36]

## THE PRESUMPTION OF INNOCENCE

The presumption of innocence is not a presumption in the strict sense of the term. It is simply a rule of evidence which allows the defendant to stand mute at trial and places the burden upon the government to prove the charges against him beyond a reasonable doubt. Apart from the Supreme Court's dictum in *Stack v. Boyle*,[37] there is no basis for thinking that the presumption of innocence has any application to proceedings prior to trial.[38] If it did, the long established practice of pretrial detention of those charged with capital crimes and those found likely to flee, to whom the presumption of innocence applies with equal force at trial, would be unwarranted. Indeed, we have long recognized in the law the propriety of certain forms of temporary pretrial detention such as that necessary to effect arrest and presentment. It has never been thought that these forms of temporary pretrial custody violated the presumption of innocence.

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[32] Foote, *supra* note 15, at 763. There is no statutory authorization for such release in Sweden. Norway, Denmark and West Germany have statutory authorization but the practice has fallen into disuse for the reasons stated in the text. *Id.*

[33] Carlson v. Landon, 342 U.S. 524, 545 (1952).

[34] Statute of Westminster the First, 3 Edw. 1, c. 12 (1275); 4 W. BLACKSTONE, COMMENTARIES *296-300; 2 M. HALE, PLEAS OF THE CROWN 126-34 (Emlyn ed. 1800); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 233-38 (1883); State v. Konigsberg, 33 N.J. 367, 370, 164 A.2d 740, 742 (1960) (authorities cited therein).

[35] *See, e.g.*, 7 GEO. 4, c.64, § 1 (1826); 11 & 12 Vict. c.42, § 23 (1848); Criminal Justice Act 1967, c. 80, § 18.

[36] Regina v. Gentry, 39 Crim. App. 195, 196 (Crim. App. 1955).

[37] 342 U.S. 1 (1951). "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* at 4.

[38] *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 404, at 76 (1969); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1501 (1966).

### THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The fifth amendment's due process clause[39] is not an absolute bar to official restraint of persons prior to trial and final judgment. As the Supreme Court has said in a related context:

> [T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.
>
> The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction.[40]

The test is one of reasonableness, which inevitably involves a weighing of the individual's interest in freedom against society's just demands for varying degrees of restraint under particular circumstances.[41]

In a wide variety of situations, official restraint prior to final judgment of conviction for an offense is consistent with due process of law. As discussed above,[42] and equally pertinent here, discretionary denial of bail in capital cases has been authorized by federal law since 1789. No allegation that this authority violates due process requirements has ever received judicial support. Moreover, bail pending appeal following conviction may be denied in the federal court's discretion if it appears that the defendant's release may "pose a danger to any other person or the community." [43]

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[39] U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

[40] Zemel v. Rusk, 381 U.S. 1, 14 (1965) (reasonable governmental restrictions on right to travel abroad do not violate due process).

[41] *Cf.* Terry v. Ohio, 392 U.S. 1, 20-27 (1968) (reasonableness is test for restraints on liberty caused by stop and frisk procedures).

[42] See text at notes 11-21 *supra*.

[43] 18 U.S.C. § 3148 (Supp. III, 1968). *See, e.g.*, Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962); United States v. Wilson, 257 F.2d 796 (2d Cir. 1958); United States *ex rel.* Estabrook v. Otis, 18 F.2d 689 (8th Cir. 1927).

Federal Rule of Criminal Procedure 46(a)(2) provides that "[b]ail *may be allowed* pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay." FED. R. CRIM. P. 46(a)(2) (emphasis added). The effect of this rule upon the denial of bail prior to a trial on the merits is questionable since Rule 46(a)(1) provides that "[a] person arrested for an offense not punishable by death *shall* be admitted to

Detention prior to or during trial has been sanctioned where the defendant's release threatens to interfere with the trial. Thus, threats against witnesses or jurors, disruptive conduct during the trial or similar misconduct may justify revocation of bail. As Mr. Justice Harlan has stated:

> District courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice.[44]

Deprivations of freedom for substantial periods of time on grounds of anticipated criminal conduct prior to any adjudication of guilt or innocence are authorized under other necessary and reasonable circumstances. For example, federal law authorizes indefinite commitment of persons charged with federal offenses who are determined to be incompetent to stand trial and whose release pending trial would "probably endanger the safety of the officers, the property, or other interests of the United States . . . ."[45] This procedure was sustained by a unanimous Supreme Court in *Greenwood v. United States.*[46] In the District of Columbia, a statute[47] which authorizes pretrial commitment to a hospital for a mental examination for a reasonable period, usually sixty days, of persons charged with crime, based only on the court's observations of the accused or prima facie evidence submitted, has never been considered to contravene due process.

Statutes authorizing indeterminate civil commitment for sexual psychopaths, narcotics addicts, chronic alcoholics, the mentally ill and others

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bail." *Id.* 46(a)(1) (emphasis added). Justice Douglas in Carbo v. United States, *supra*, considered this difference in language significant, emphasizing that the court has discretion under Rule 46(a)(2) to deny bail. 82 S. Ct. at 666. The House Report on the Bail Reform Act of 1966 also draws a distinction between noncapital cases before and after trial:

> This section [3148] treats those accused of capital offenses and convicted persons differently from persons accused of noncapital offenses. . . . Since there is no absolute right to bail in capital cases nor in the cases of convicted persons, the courts are empowered to elect to detain defendants in such cases.

H.R. Rep. No. 1541, 89th Cong., 2d Sess. 15 (1966).

[44] Fernandez v. United States, 81 S. Ct. 642, 644 (Harlan, Circuit Justice, 1961); *see* Bitter v. United States, 389 U.S. 15, 16 (1967); *cf.* Carbo v. United States, 82 S. Ct. 662, 668 (Douglas, Circuit Justice, 1962).

[45] 18 U.S.C. § 4247 (1964).

[46] 350 U.S. 366 (1956).

[47] 24 D.C. Code Ann. § 301(a) (1967).

considered dangerous are not uncommon and, in their essential features, have generally been held constitutional.[48] In *Minnesota ex rel. Pearson v. Probate Court*,[49] the Supreme Court rejected contentions that due process and equal protection were violated by a state sexual psychopath statute authorizing commitment of persons "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." [50] That statute, like many similar statutes, did not require prior conviction of an offense as a prerequisite for commitment.[51]

Moreover, detention has been authorized in noncriminal areas prior to any judicial determination. Thus, in *Carlson v. Landon* the Supreme Court upheld the denial of bail to alien Communists pending deportation proceedings on due process[52] as well as eighth amendment grounds. In 1964, Congress enacted the District of Columbia Hospitalization of the Mentally Ill Act,[53] a bill sponsored by Senator Ervin as Chairman of the Senate Subcommittee on Constitutional Rights as a model act in this area.[54] This Act provides for the detention in a hospital of persons believed to be mentally ill and dangerous prior to any court finding of either mental illness or resulting dangerousness and, unlike the provisions here under discussion, does not even require a triggering act of any kind.[55] Although preadjudication detention is authorized on the basis of status or condition alone, these provisions, in light of the cases discussed above, do not run afoul of the due process clause.

In short, the due process clause of the Constitution does not prohibit pretrial detention in criminal cases. Its requirements are those of reasonableness—the restraints imposed on the liberty of an accused must be reasonable when balanced against society's acknowledged interest in preventing commission of further crimes while the defendant is awaiting trial.

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[48] *See generally* Note, *Civil Commitment of Narcotic Addicts*, 76 YALE L.J. 1160 (1967).

[49] 309 U.S. 270 (1940).

[50] 309 U.S. at 273, *quoting* State *ex rel.* Pearson v. Probate Court, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939).

[51] *E.g.*, ILL. ANN. STAT. ch. 91-1/2, §§ 6-1 to 6-5 (Smith-Hurd Supp. 1969); MICH. COMP. LAWS ANN. § 330.19 (Supp. 1968).

[52]

> The refusal of bail in these cases is not arbitrary or capricious or an abuse of power. There is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.

342 U.S. at 542.

[53] 21 D.C. CODE ANN. §§ 501-91 (1967).

[54] SEN. COMM. ON THE JUDICIARY, CONSTITUTIONAL RIGHTS OF THE MENTALLY ILL, S. REP. No. 925, 88th Cong., 2d Sess. 10 (1964).

[55] 21 D.C. CODE ANN. §§ 521, 528 (1967).

### *Analysis of the Pretrial Detention Proposal in Light of Due Process Requirements*

In analyzing a pretrial detention proposal to determine whether it comports with the due process requirements of reasonableness, three major considerations emerge. First, value judgments must be made concerning the degree of harm to be anticipated from particular categories of defendants. Second, appropriate procedural safeguards must be devised to assure that only those individuals who actually pose a danger to the community are detained. Third, the statute must seek to minimize, as far as practicable, the burdens of pretrial detention. The Administration's pretrial detention proposal clearly satisfies these due process requirements. Indeed, a close examination of its provisions reveals that they incorporate standards far above the minimum necessary to avoid any possible conflict with the due process clause.

### *Categories of Detainable Offenses*

The Administration's proposal limits the categories of defendants who may be detained to those charged with highly dangerous offenses (1) which involve the threat of serious bodily injury or death, and (2) which are either of the kind which common sense, experience, and available statistics indicate are not "one-shot affairs" but involve repeat offenders, or involve narcotics addicts or persons who have recently been convicted of or charged with other violent crimes. In addition, the statute codifies existing law by authorizing detention in any case in which the defendant threatens a prospective witness or juror.[56]

Though the Administration's proposal scrupulously limits the categories of defendants who may be detained to those whose recidivous tendencies to commit dangerous offenses are clearly established, it should be noted that based on history and present day practice, neither the eighth amendment nor the due process clause requires proof of recidivous tendencies. Since 1790, bail has almost universally been denied defendants charged with premeditated murder, a capital crime, on a mere finding of probable cause. Similarly, the Bail Reform Act of 1966 specifically provided for pretrial detention on grounds of the dangerousness of defendants charged with capital crimes.[57] The almost universal experience of law enforcement officials, however, has been that most persons who are charged with this offense murder family members or paramours and therefore are the least likely of all offenders to be recidivists. Nevertheless, they have been and still are routinely detained pending trial.

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[56] *See* Fernandez v. United States, 81 S. Ct. 642 (Harlan, Circuit Justice, 1961).

Of the detainable offenses in the Administration's proposal, the category of "dangerous federal crimes"—robbery, burglary, arson, rape, sex crimes and unlawful drug sales—does not require specific proof of a former charge or conviction as does the second category of "crimes of violence." But the "dangerous federal crimes" category is limited to crimes which usually result from a continuing motivation of pecuniary profit or sexual gratification, which involve planning, deliberation and the purposeful selection of a victim who is almost always a stranger. Moreover, apart from sex offenses, these dangerous crimes frequently involve cooperation with other criminals on a continuing basis. The nature of these offenses, the fact that the arrest rate for such crimes is typically under 15 percent[58] and the long experience of law enforcement officers with such offenders, compels the conclusion that a person charged with commission of one of these crimes is rarely apprehended on his first criminal venture.

Meaningful empirical data showing recidivism and predicting criminal behavior is limited; few records have been kept. Moreover, over 50 percent of criminal activity goes unreported and fewer than 25 percent of the reported crimes result in arrests.[59] In the District of Columbia, however, one study shows that of 557 persons indicted for robbery in 1968, 70.1 percent of the persons released prior to trial were rearrested while on bail.[60] In a sample of 65 cases involving those who were rearrested, 28 cases were terminated during the survey period; and 82.1 percent of the defendants in these completed cases were convicted of the crime committed while on pretrial release.[61] This persuasive proof of the recidivous tendencies of this class of criminals is all the more remarkable in light of the following two facts: first, arrests are made in less than 15 percent of all crimes committed, indicating that criminals in this class probably committed many other crimes before rearrest; and second, the 70.1 percentage for rearrest is limited to those released prior to trial. In view of the *sub rosa* practice of judicial officers of denying pretrial release to dangerous offenders by setting high monetary bail, the 212 persons not released prior to trial—38.1 percent of the entire group—undoubtedly contained the highest percentage of dangerous persons.

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[57] 18 U.S.C. § 3148 (Supp. IV, 1969).

[58] Less than 50% of these serious crimes are reported to the police and the arrest rate for those crimes which are reported is only about 25%. Thus, the actual arrest rate for committed, as contrasted with reported crime, is about 12.5%. See notes 73-74 *infra* and accompanying text.

[59] See text at notes 73-74 *infra*.

[60] Of the 345 persons released, 242 were rearrested while on bail. REPORT OF THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA 20-21 (May 1969).

[61] *Id.*

The second category of detainable offenses, "crimes of violence," includes many more offenses than the category of "dangerous federal crimes." Detention for those charged with these crimes of violence, however, is authorized for only two classes of offenders, both inherently recidivous. One class is narcotics addicts, recidivists for the obvious reason of their continuing need to supply their drug habits. The second class consists of persons whose proclivity for dangerous crime is evidenced by the commission of a crime of violence while they are on bail, probation or parole for a prior crime of violence or who have been convicted of a crime of violence within the ten-year period preceding the commission of the alleged offense.

Since these categories carefully circumscribe the imposition of pretrial detention, the potential aggregate impact of the Administration's proposal, in terms of the persons detained, is quite narrow. In a recent survey of all persons charged with offenses by the United States Attorney in the District of Columbia during a two-week period, a pretrial detention order could have been sought under the Administration's proposal in approximately 10 percent of the cases.[62] Because of the procedural safeguards provided by the bill, preventive detention would actually have been imposed in far less than 10 percent of these cases.

### *Procedural Safeguards*

The Administration's proposal expressly provides the necessary due process procedural safeguards. No detention order may be entered prior to a judicial hearing in which the defendant is represented by counsel, has an opportunity to present witnesses in his behalf and has an opportunity to cross-examine adverse witnesses. The burden of proof of dangerousness would, of course, rest upon the Government. Furthermore, the order of detention must be accompanied by written findings of fact to justify its entry. The judicial hearing officer is required to make three independent findings as a precondition to detention, all of which are designed to insure, with the greatest degree of accuracy possible, that only those defendants are detained whose release would expose the community to an unreasonable risk of serious danger.

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[62] Only 44 of the 459 persons charged would have met the requirements of the Administration's pretrial detention program. The above figures were derived from an informal study conducted by the Department of Justice in the courts of the District of Columbia.

First, the defendant must be within one of the categories of detainable offenses, which, as described above, are limited to offenses committed by recidivists—precisely those persons who, if released, are most likely to commit dangerous crimes, intimidate witnesses and destroy or secrete incriminating evidence. Thus, persons charged with other offenses—approximately 90 percent of all persons charged with crime[63] —cannot be detained.

Second, the hearing officer must find that no condition or combination of conditions of release will reasonably assure the safety of the community. This determination must be based on all available relevant information bearing on the anticipated dangerousness of the defendant, including the nature and circumstances of the offense charged, his family ties, employment, financial resources, character, mental condition, past conduct and record of convictions. If these factors, taken together, indicate that the defendant, even though he falls within one of the detainable categories, could safely be released, for example, on his own recognizance or in the custody of a third person, he must be released.

Third, except where intimidation of a prospective witness or juror is involved, the judicial officer must find on the basis of information presented that there is a substantial probability that the defendant committed the offense with which he is charged. This test is perhaps best compared to the civil test for the issuance of a preliminary injunction, frequently characterized as a "likelihood of eventual success on the merits."[64] The defendant, of course, is allowed, through counsel, to introduce whatever evidence he deems appropriate to challenge this finding.

A finding of probable guilt of the offense charged is critical for two reasons. It means that in the vast majority of cases where detention is ordered, the defendant will be convicted of the charge or some lesser included offense. Thus, the chance that an innocent defendant who is not dangerous will be detained is reduced to a minimum. Detained defendants will receive credit towards service of their sentences for time served in detention, thereby mitigating the possibility of unfairness to them. More fundamentally, a finding of probable guilt of a violent crime is the best possible evidence of future dangerousness. Although community ties, employment, character and similar factors concerning a defendant may indeed indicate a proclivity for antisocial conduct, nothing more clearly forebodes future criminal activity than the commission of a crime in the immediate past. Similar reasoning underlies the widely adopted statutes providing for indefinite commitment of dangerous offenders who are acquitted of criminal charges by reason of insanity.[65]

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[63] See note 62 *supra* and accompanying text.

[64] W. E. Bassett Co. v. Revlon, Inc., 354 F.2d 868, 872 (2d Cir. 1966).

### *Provisions Mitigating the Burden of Confinement*

Deprivation of freedom is, of course, an inevitable consequence of pretrial detention. Some burdens that might otherwise be incident to detention, however, may be substantially reduced, and the Administration's proposal incorporates such provisions so far as they are feasible. In recognizing that the fifth and sixth amendments' "guarantee to persons accused of crime the right privately to consult with counsel both before and during trial," [66] the bill provides for such private consultation. In addition, for good cause shown, the proposal allows the defendant to be released in the custody of a reliable person in order to prepare his defense—for example, to search for witnesses. The bill also provides that detained persons are to be confined, to the extent practicable, in facilities separate from convicted persons. They may not be detained more than sixty days solely on grounds that their release will expose the community to an unreasonable risk of danger, and even within the sixty-day maximum, trials are to be expedited to the extent practicable.

### *Significance of the Absence of Precise Statistic-Based Guidelines for Predicting Dangerousness*

Critics of pretrial detention proposals argue that the need for such detention has not been demonstrated. While acknowledging that accused persons frequently do commit additional crimes if released on bail, they contend that the magnitude of the problem is not precisely documented, that less stringent remedies have not yet been tried and found wanting, and that additional studies should be undertaken to develop more precise criteria upon which to predict dangerousness.[67] In response to these critics, it should be noted at the outset that no serious constitutional question has been raised, due process or otherwise, to what is in effect pretrial detention of defendants charged with capital crimes or defendants considered unlikely to appear for trial. The Bail Reform Act of 1966 specifically permits pretrial detention of defendants who are charged with capital crimes and are considered likely either to flee or to pose a danger to the community[68] and by implication authorizes pretrial detention of all defendants considered likely to flee by permitting judicial officers to impose execution of a bail bond with a solvent surety as a condition of release, even if the defendant cannot satisfy this condition and will therefore remain in custody until trial. Such detention, moreover, is more often than not for periods of time in excess of sixty days and frequently as long as a year.

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[65] *E.g.*, Mo. ANN. STAT. § 552.040 (Supp. 1968-69); 29 OHIO REV. CODE ANN. § 2945.39 (Page Supp. 1968); 42 WIS. STAT. ANN. § 957.11(3) (1958); MODEL PENAL CODE § 4.08 (Proposed Official Draft 1962).

[66] Coplon v. United States, 191 F.2d 749, 759 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

The criteria for determining the dangerousness of capital crime defendants or the risk of flight of other defendants set forth in the Bail Reform Act are no more refined in a statistical sense than are the proposed criteria for determining the dangerousness of defendants under the Administration's bill. Accordingly, objections to pretrial detention of dangerous defendants on the ground that it is improper to confine those not yet convicted or on the ground that judicial and law enforcement officers lack sufficiently accurate information upon which to detect dangerousness, apply with equal force to existing pretrial detention practices—detention because of risk of flight or of dangerous capital offense defendants. Yet these grounds of objection have never been considered to preclude such detention because society has an acknowledged right, consistent with procedural due process, to impose reasonable conditions, including detention, to assure that defendants will appear for trial or that capital crime defendants will not pose a danger to the community. Similarly, society has an equally important right to impose reasonable conditions, including detention, to assure that those charged with noncapital but dangerous crime will not expose the community to unreasonable risks of danger prior to trial.

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[67] *See, e.g.*, testimony of Judge Harold H. Greene and Professor Alan Dershowitz, *Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess., 29, 172 (1969).

[68] 18 U.S.C. § 3146(a)(4) (Supp. IV, 1969). See Allen v. United States, 386 F.2d 634 (D.C. Cir. 1967) (dictum).

There are other statutes which authorize confinement, even indeterminate confinement, on grounds of dangerousness without any refined mathematical bases for predicting dangerousness.[69] One such statute, the District of Columbia Hospitalization of the Mentally Ill Act,[70] merits specific attention because, as the Senate Committee report shows, this bill originated and passed as an Act "Protecting the Constitutional Rights of the Mentally Ill." [71] Although specifically drafted to protect constitutional rights whenever possible, the Act permits commitment of mentally ill persons found likely to injure themselves or others if allowed to remain at liberty without providing any criteria for this finding.[72] Thus, the conclusion is inevitable that statistical evidence which permits predictability with precise mathematical accuracy is not constitutionally necessary to warrant confinement on grounds of dangerousness. Instead, it is sufficient to place reliance, as is the practice in the law, on the insight and experience of trial judges applying appropriate qualitative standards.

Available statistics on crimes committed by persons released pending trial are necessarily fragmentary. This is attributable to the unavailability or incompleteness of court records and to the absence of information on how many undetected crimes are committed by persons released on bail. It has been estimated that approximately 75 percent of *reported* serious crimes are never solved[73]—a statistic which strongly suggests that most crimes committed by persons released on bail are not solved. Moreover, a substantial number of serious crimes committed, over 50 percent, are not even reported.[74] As long as a majority of serious crimes are not reported and the great majority of those which are reported remain unsolved, the precise extent of recidivism on pretrial release can never be fully documented. Because the problem is, by any standard, a serious one, information of a precise mathematical quality, while helpful, is not necessary to justify congressional action.

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[69] See text at notes 45–48 *supra*.

[70] 21 D.C. Code Ann. §§ 501-91 (1967). See text at notes 53-55 *supra*.

[71] S. Rep. No. 925, *supra* note 54, at 1.

[72] 21 D.C. Code Ann. § 545(b) (1967).

[73] In the District of Columbia 34,765 serious crimes were reported in 1966; 9159 or 26.3% were solved. President's Commission on Crime in the District of Columbia, Report 596 (1966).

[74] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and its Impact—An Assessment 17-19 (1967).

There are, to be sure, alternative methods for attempting to deal with the problem. While these alternatives, including speedier trials, additional penalties for crimes committed during pretrial release and expanded use of bail agencies to supervise releasees, have been tried, they have not been extensively or effectively used. The Administration's proposals dealing with criminal problems include implementation of all these approaches.[75] Even assuming maximum feasible implementation of these approaches, however, available data and reason strongly indicate that certain defendants will commit additional serious crimes if released pending trial. There is no real alternative to detention of such persons, if the community is to receive the protection it deserves. Reliance must be placed on a carefully drawn statute which incorporates procedural safeguards, reasonable standards and the experience and insight of trial judges. Here, as in other contexts, due process of law requires fundamental fairness, not perfect accuracy.

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[75] *See* 27 Cong. Q. Weekly Rep. 238 (Feb. 7, 1969).

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# AN OUNCE OF DETENTION: PREVENTIVE JUSTICE IN THE WORLD OF JOHN MITCHELL

*Laurence H. Tribe**

IN the land of Erewhon, punishment was replaced with social hygiene, and all those with criminal tendencies were committed for indefinite periods of cure. Moved perhaps by his own small vision of utopia, President Nixon recently proposed legislation "whereby dangerous hard core recidivists could be held in temporary pretrial detention when they have been charged with crimes and when their continued pretrial release presents a clear danger to the community."[1]

More recently, Attorney General John Mitchell published a constitutional defense of the President's proposal in the *Virginia Law Review*.[2] That the Administration's chief legal officer should think it necessary to take so unusual a step may seem strange in light of the dubious ability of pretrial preventive detention to contribute to the control of crime. Offenses committed by persons awaiting trial represent only a small component of the total crime problem.[3] Indeed, if sensible steps were taken to shorten the delays between arrest and trial, impose additional penalties for crimes committed during the pretrial period, and more closely supervise the behavior of those released, this component would become even smaller.[4] Many judges have tried to deal with the problem by practicing a *sub rosa* form of preventive detention in bail determinations, but the practice has met with little success in separating likely offenders from safe risks.[5] Given the present state

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*Assistant Professor of Law, Harvard University. A.B., 1962; LL.B., 1966, Harvard University.

[1] 27 CONG. Q. WEEKLY REP. 238 (Feb. 7, 1969). The proposal passed the House of Representatives on March 19, 1970, 28 CONG. Q. WEEKLY REP. 847 (Mar. 27, 1970), as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, H.R. 16196, 91st Cong., 2d Sess. §§ 23-1321 to -1331 (1970). The text of the proposal appears at 115 CONG. REC. 7908 (daily ed. July 11, 1969). The Senate's D.C. crime bill did not provide for preventive detention, *see* 28 CONG. Q. WEEKLY REP. 848, 849 (Mar. 27, 1970), and the bills are now before a conference committee, *see* Wash. Post, Apr. 13, 1970, at 1, col. 3. The Administration is also apparently interested in the proposal of Dr. Arnold Hutschnecker for the identification, compulsory "treatment" and preventive incarceration of children who evidence criminal tendencies. *See* TIME, Apr. 20, 1970, at 8.

[2] Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969) [hereinafter cited as Mitchell].

[3] Only 5.9% of all persons indicted in the United States District Court for the District of Columbia in 1968 allegedly committed an offense while on bail awaiting another charge. JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA, REPORT 19 (May 1969) [hereinafter

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cited as Report of the Judicial Council Committee]. Less than 9.2% of all defendants released between arrest and trial through the D.C. Bail Project during the 2½ years of its operation were charged with committing offenses (including the most trivial) during the period of release. Of these charges, 35.4% had been dismissed, nolled, ignored by the grand jury or inadequately proven at trial as of July 1, 1966, leaving a conviction rate of under 6%. Bail Reform in the Nation's Capital: Final Report of the D.C. Bail Project 44 (1966). A study by the District of Columbia Crime Commission found that 7.5% of all persons released while awaiting trial on felony charges were arrested and held for grand jury action for other offenses allegedly committed prior to trial, President's Commission on Crime in the District of Columbia, Report 515 (1966), but only 4.5% of the defendants studied were arrested for crimes of actual or potential violence. *Id.* at 931.

The Attorney General attempts to paint a more serious picture with respect to a single offense by pointing out that "of 557 persons indicted for robbery in 1968 [in the District of Columbia], 70.1 percent of the persons released prior to trial were rearrested while on bail." Mitchell, *supra* note 2, at 1236. The Attorney General fails to note, however, that the report he cites contains, after the quoted figure, a footnote stating that five of its eleven authors found "little probative value in a figure which measures only rearrests without regard to conviction or acquittal . . . ." Report of the Judicial Council Committee, *supra*, at 20 n.2. Moreover, the Administration's proposal does not require any indictment as a prerequisite to preventive detention. Chief Judge Greene of the District of Columbia Court of General Sessions has cautioned that studies that compare (a) the number of persons arrested while on bail to (b) the number of persons originally indicted greatly inflate the relevant ratio, which is that between (a) the number arrested while on bail and (b) the total number *originally arrested. Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 42 (1969) (testimony of Chief Judge Harold H. Greene) [hereinafter cited as *1969 Hearings*]. Chief Judge Greene doubted that such a "study really shows anything much beyond what the author . . . was looking for." *Id.*

[4] All the figures cited in note 3, *supra*, could be reduced to less than half their present magnitude if only the time lag between arrest and trial could be held to under 60 days, quite apart from the further reductions in pretrial crime that could be achieved by closer supervision and additional penalties. *See* Report of the Judicial Council Committee, *supra* note 3, at 23; *1969 Hearings*, *supra* note 3, at 22-23 (testimony of Judge George L. Hart, Jr.); McCarthy, *Practical Results of Bail Reform*, 29 Fed. Probation 10, 12 (Sept. 1965); Note, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1508 (1966).

[5] It is widely acknowledged that bail determinations are frequently influenced, however illegitimately, by an unarticulated desire to imprison particular defendants to prevent them from committing crimes before trial. *See, e.g.*, ABA Project on Minimum

of the predictive art, codification of this practice would probably not measurably enhance the safety of the community.[8]

The proposed legislation's capacity to reduce crime is, however, a poor indicator of its political popularity. Its adoption would create the impression that the Administration was taking substantial steps to restore safety to our communities. Since such a delusion might ease the frustration and fear of those who feel helpless in the face of mounting

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Standards for Criminal Justice: Standards Relating to Pretrial Release 6 (Tent. Draft, Mar. 1968) [hereinafter cited as ABA Standards Report]; Proceedings of the National Conference on Bail and Criminal Justice 151 (April 1965); Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031, 1038-43 (1954). People v. Melville, 6 Crim. L. Rep. 2442 (N.Y. County Crim. Ct., Mar. 11, 1970), is the only case to recognize preventive detention explicitly as a ground for denial of bail prior to trial. Bringing the *sub rosa* practice to the surface, the court declared that

> bail may be denied for two reasons. First, where it is reasonable to assume that the defendant will flee the jurisdiction and avoid trial if admitted to bail. Secondly, if his release on bail poses a threat to the welfare and safety of the community.

*Id.* at 2443.

The *sub rosa* approach has generated much dissatisfaction, not least because it has enjoyed no conspicuous success in detaining the right individuals. *See, e.g., 1969 Hearings, supra* note 3, at 69-71 (testimony of Bruce D. Beaudin, Director, District of Columbia Bail Agency), comparing the pretrial conduct (pretrial offense rate of 8%) of the defendants released by a judge who gave great weight to the risk of crime in his release decisions, and therefore detained 51% of all defendants, with the pretrial conduct (pretrial offense rate of 9%) of the defendants released by a judge who regarded the risk of future crime as essentially immaterial, and therefore detained under 21% of all defendants.

[8] There is no basis for the assumption that bringing dangerousness to the surface as a criterion for pretrial detention would significantly improve the predictive performance of the judges administering the system. Although dangerousness has always been recognized as a legitimate basis for denying bail on appeal, *see, e.g.*, Carbo v. United States, 82 S. Ct. 662, 666 (Douglas, Circuit Justice, 1962) (dictum); Leigh v. United States, 82 S. Ct. 994, 996 (Warren, Circuit Justice, 1962) (dictum); Hansford v. United States, 353 F.2d 858 (D.C. Cir. 1965); United States v. Wilson, 257 F.2d 796 (2d Cir. 1958); 18 U.S.C. § 3148 (Supp. IV, 1969), the fact that the real reasons for detention pending appeal have been candidly exposed and subject to appellate review has not made judicial predictions of dangerousness after conviction any more accurate than such predictions before trial. On the contrary, it appears that judges release a significantly higher percentage of bad risks on appeal, where the recidivism rate for defendants on bail in the District of Columbia is roughly 15%, than they do before trial, where the rate is under 9%. *See 1969 Hearings, supra* note 3, at 81 (testimony of Senator Joseph D. Tydings). A similar phenomenon may be observed in the juvenile field, where a recidivism rate of 11% persists despite an openly recognized judicial authority to detain for dangerousness. *See 1969 Hearings, supra* note 3, at 131 (testimony of Mrs. Patricia M. Wald). Openness and candor may be desirable, but they will not turn judges into prophets.

violence, even a false impression of progress would have some value. But the legislation would operate as a dangerous palliative by relieving public pressure for the less dramatic and more expensive types of reform that alone might restore peace to urban life. And, although the Administration's proposal might purchase psychological comfort for the silent majority, its costs would include the heightened insecurity of the many minorities, both racial and political, who would view themselves as the new law's primary targets.[7] Furthermore, this insecurity would eventually spread beyond these groups, for the approach underlying the proposed legislation threatens the fundamental security provided for all of society by a system that guarantees that no one need fear prolonged imprisonment as a criminal until it is proved beyond a reasonable doubt that he has engaged in clearly prohibited conduct.[8]

Mr. Mitchell has defended the President's proposal in a scholarly journal in part, no doubt, because the Administration sees the legislation as an opportunity to create the image of a vigorous assault on crime. But Mr. Mitchell may also understand more to be at stake in the controversy than the fate of this particular law. For while the Attorney General stresses the supposed narrowness of the pending measure,[9] the demands of the not-so-silent majority for security would make a further expansion of preventive incarceration too attractive to resist.

The appeal of preventive imprisonment is as old as it is seductive. Witness this classic exchange in Lewis Carroll's *Through the Looking Glass*:[10] The Queen observes that the King's Messenger is "in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all." Perplexed, Alice asks, "Suppose he never commits the crime?" "That would be all the better, wouldn't it?" the Queen replies. Indeed it would, and for that very reason we can hardly expect either the Queen or the constituency the Attorney General represents to limit its logic to narrow categories of defendants.

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[7] The apprehensions of these groups were hardly alleviated by the recent decision of District Judge Julius Hoffman to imprison the Chicago Seven pending appeal of their convictions for crossing state lines with intent to incite a riot. Explaining his denial of their motion for bail, Judge Hoffman reasoned that the defendants, if released, might continue the sorts of political activities for which they had been tried, and that the resulting "danger to . . . the community," 18 U.S.C. § 3148 (Supp. IV, 1969), warranted the denial of bail as they pursued their appeals, even though one of the major questions on appeal would be the constitutionality of punishing the very conduct at issue. *But see* Roth v. United States, 77 S. Ct. 17, 19 (Harlan, Circuit Justice, 1956) (when the constitutionality of a statute is at issue, the likelihood that a defendant might continue to violate it if released cannot be used to justify his imprisonment pending appeal); *cf.* Carbo v. United States, 82 S. Ct. 662, 667 (Douglas, Circuit Justice, 1962) (dictum). The Seventh Circuit Court of Appeals later reversed Judge Hoffman's ruling, N.Y. Times, Mar. 1, 1970, at 1, col. 5, but the Justice Department's willingness to press Hoffman's position is difficult to ignore in any assessment of how the Administration might employ the power the proposed bill would confer.

[8] See text at notes 71, 95 *infra*.

[9] Mitchell, *supra* note 2, at 1235, 1237.

[10] L. CARROLL, THROUGH THE LOOKING GLASS 88 (Harper & Bros. ed. 1902).

Alice in Wonderland?

Even as an experiment, the Administration's proposal has the distinct air of an episode from Alice's Wonderland, for it is an experiment that can only confirm and never rebut the experimenter's hypothesis. Once the government has instituted a system of imprisonment openly calculated to prevent crimes committed by persons awaiting trial, the system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated. The pretrial misconduct of these persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely have been released, its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by its results.

Note: Liberty interests

The inevitable consequence is a continuing pressure to broaden the system in order to reach ever more potential detainees. Indeed, this pressure will be generated by the same fears that made preventive detention seem attractive in the first place. What begins as an ounce of detention, therefore, may well become the first step of a profound shift in our system of criminal justice—a system that, at least until now, has operated on the premise that crime should normally be prevented by the threat of subsequent punishment rather than the imposition of prior imprisonment.

Apart from its inherent capacity for unrestrained growth, an equally significant implication of the President's proposal is its inevitable reliance on a mode of constitutional discourse exceptionally hospitable to the authoritarian values of "order" and dangerously inimical to the libertarian values of "law." The Attorney General's constitutional *apologia* for the President's legislative program furnishes an ideal illustration of this thinking. "The test," says Mr. Mitchell, "is one of reasonableness, which inevitably involves a weighing of the individual's interest in freedom against society's just demands for varying degrees of restraint under particular circumstances."[11] Applying this "test," the Attorney

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[11] Mitchell, *supra* note 2, at 1232 (footnote omitted).

General unsurprisingly concludes that the President's proposal is "reasonable." Mr. Mitchell's guide, as he explains elsewhere, has been "the ancient common law guide of the 'reasonable man' whom our forefathers established as the enlightened compromiser in a pluralistic society." [12] Hence, the constitutional position of the Justice Department has been, "in general, to negotiate a practical middle-of-the-road solution." [13] But the Constitution does not always straddle dead center, and its compromises are not always dictated by a utilitarian calculus. The general thesis of this Article is that the Constitution mandates more than Mr. Mitchell's willingness to take certain individual interests into account when striking a pragmatic balance among conflicting goals and values; that the basic function of constitutional limitations is to set constraints of moral principle upon the extent to which society may pursue collective aims at the expense of unwilling individuals; that the President's proposal violates several such constraints; and that the acceptance of the proposal, particularly in terms of the defense offered by the Attorney General, would undermine the role of the Constitution as an embodiment of principled restraints on government.

## THE ADMINISTRATION'S PROPOSAL AND BASIC CONCEPTS OF CRIMINAL JUSTICE

Throughout history, governments have been tempted to establish order by identifying and imprisoning in advance all likely troublemakers. Our society, however, has made the basic decision not to entrust such sweeping power to the state. We have relied instead upon the moral and deterrent effects of laws which define particular acts as criminal and which punish all who violate their proscriptions. For those believed dangerously ill and hence incapable of controlling their behavior in response to this system of deterrents, we have devised programs of civil commitment. For the rest, we have relied on the threat of sanctions. Recognizing that this threat will not deter all those who can control their behavior, we have accepted some risk of crime as the inevitable price of a system that promises to punish no man until it is shown beyond a reasonable doubt that he has committed a specific illegal act.

good topic

! punishment vs. regulatory detention

At the same time, we have realized that a deterrent system cannot function at all unless society can successfully prosecute lawbreakers. Hence we have traditionally detained individuals likely to flee or otherwise avoid prosecution. This limited form of pretrial detention is considered essential to the preservation of a system that seeks to control crime by threatening subsequent punishment rather than by imposing prior imprisonment. It does not, however, provide precedent for the proposed legislation. On the contrary, detention to insure prosecution for a past crime is the antithesis of detention to prevent the commission of a future crime.

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[12] Mitchell, *Wiretapping and Pretrial Detention—Balancing the Rights of the Individual with the Rights of Society*, 53 J. AM. JUD. SOC'Y 188 (1969).

[13] *Id.*

The Attorney General denies that the President's proposal represents so sharp a break from our legal traditions. He argues that there is ample precedent for imprisoning unconvicted citizens to prevent future offenses.[14] To support his thesis, he repeatedly stresses that alleged capital offenders have traditionally been denied pretrial liberty.[15] Expressing an opinion shared by others,[16] the Attorney General claims that such defendants have ordinarily been subjected to pretrial detention because of their "anticipated danger to other persons or the community."[17] Mr. Mitchell offers no evidence, however, to support his contention. The most plausible explanation for pretrial detention of alleged capital offenders is the assumption that few men facing the death penalty can be trusted to appear for trial.[18] As the Attorney General himself points out, "[t]he common law . . . imposed capital punishment for most felonies,"[19] not simply those indicating particularly dangerous tendencies. It is doubtful that very many people, even in the eighteenth century, thought that persons charged with larceny of goods valued at over $50 or forging United States currency were too dangerous to release into the community before trial. Yet under the Federal Crimes Act of 1790,[20] both of those offenses were punishable by death and hence non-bailable. Furthermore, the same treatment was applicable in a number of states to such offenses as horse theft[31] and sodomy.[32]

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[14] Mitchell, *supra* note 2, at 1225-30, 1232-36, 1240-41.

[15] *Id.* at 1225, 1227, 1232, 1235-36, 1240.

[16] *See, e.g.*, *1969 Hearings*, *supra* note 3, at 86 (testimony of Senator Joseph D. Tydings); Address by Deputy Attorney General Richard G. Kleindienst, "The Case for Pretrial Detention," Mid-Winter Meeting of the American Trial Lawyer's Association, Freeport, Grand Bahama Island, Jan. 30, 1970, at 26; Address by Daniel J. Freed, then Acting Director of the United States Office of Criminal Justice, Institute on the Operation of Pretrial Release Projects, New York City, Oct. 14, 1965.

[17] Mitchell, *supra* note 2, at 1225; *cf.* People v. Melville, 6 Crim. L. Rep. 2442 (N.Y. County Crim. Ct., Mar. 11, 1970).

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> The underlying motive for denying bail in the prescribed type of capital offenses is to assure the accused's presence at trial. In a choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers of the *Constitution* obviously reacted to man's undoubted urge to prefer the latter.

State v. Konigsberg, 33 N.J. 367, 373, 164 A.2d 740, 743 (1960).

[19] Mitchell, *supra* note 2, at 1229 (footnote omitted).

[20] Ch. 9, 1 Stat. 112.

The classic capital offense, premeditated murder, may provide the strongest refutation of the Attorney General's thesis. Having argued early in his article that alleged capital offenders are routinely detained pending trial "because of danger to the community,"[33] Mr. Mitchell later observes that "most persons who are charged with [premeditated murder] murder family members or paramours and therefore are the least likely of all offenders to be recidivists."[34] Precisely. There could be no better proof that fear of flight, not assumed dangerousness, accounts for the exceptional treatment of persons awaiting trial on capital charges.

no proof here, only statement

As another justification for pretrial detention, the Attorney General emphasizes the fact that civil commitment has been widely authorized for sexual psychopaths, narcotics addicts, chronic alcoholics, and other mentally disturbed persons, in part to prevent future behavior dangerous to the community.[35] To the limited extent that medical science furnishes techniques capable of objectively ascertaining the presence of dangerously incapacitating illness,[36] these precedents are obviously inapposite to the Attorney General's position, for neither a comparable body of knowledge nor a comparable technology of prediction is yet available for dealing with criminal behavior generally.

prediction

→ no of cases where prediction necessary in legal doctrines

In addition to its role as a predictive device, the requirement of a medically identifiable affliction raises another, more fundamental objection to the Attorney General's thesis. Mr. Mitchell notes that several decades ago the Supreme Court sustained a state sexual psychopath statute authorizing commitment of persons "likely to attack or otherwise inflict injury" on others.[37] In sustaining that law, however, the Court carefully observed that the statute required the existence of a condition that rendered the individual wholly unable to control his impulses.[88] There is a striking difference between the involuntary confinement of an individual who is considered dangerous for reasons beyond his control and the involuntary confinement of one who is thought to be capable of conforming his conduct to the requirements of law but is suspected of being unwilling to do so. The Administration's proposal goes beyond involuntary detention of the uncontrollably dangerous and would imprison persons presumptively able to choose between violating and obeying the proscriptions of the criminal law. To imprison such persons on the assumption that they will make the wrong choice impairs personal autonomy in a way that incarceration of the dangerously ill does not. More importantly, since our jurisprudence proceeds on the normative premise that certain cases of antisocial conduct result from morally culpable choices,[89] the preventive detention of an individual believed capable of conforming to society's demands entails a peculiarly offensive anticipatory condemnation. For if such an individual were released, and if he were to engage in the behavior predicted, he would be confined not as a sick man but as the author of a morally reprehensible act. To imprison a man because he might choose to break society's rules is to condemn and therefore punish[90] him for nothing more than his supposed intentions—something for which civil commitment, at least, furnishes no model.

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[31] Mitchell, *supra* note 2, at 1226 n.17.

[32] *Id.* at 1228-29 n.24.

[33] *Id.* at 1230.

[34] *Id.* at 1236.

[35] *Id.* at 1233-34, 1241.

[36] *See* P. Briggs & R. Wirt, Prediction, Juvenile Delinquency, Research and Theory 170 (1965); S. Glueck & E. Glueck, Predicting Delinquency and Crime (1959); Wirt & Briggs, *The Efficacy of Ten of the Gluecks' Predictors*, 50 J. Crim. L.C. & P.S. 478 (1960). There is serious skepticism, however, about the ability to predict dangerousness, and sizable empirical data suggest the inadequacy of available techniques. *See* Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 75, 77 (1968); Sawyer, *Measurement and Prediction, Clinical and Statistical*, 66 Psych. Bull. 178 (1966).

[37] Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 273 (1940).

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[88] *Id. See In re* Williams, 157 F. Supp. 871, 876 (D.D.C.), *aff'd per curiam*, 252 F.2d 629 (D.C. Cir. 1958), relied on by Goldstein & Katz, *Dangerousness and Mental Illness*, 70 YALE L.J. 225, 237-38 (1960), for the proposition that, as a matter of due process, only an individual's illness can justify a deprivation of liberty predicated on potential dangerousness.

[89] Chief Justice, then Judge, Burger, concurring in Blocker v. United States, 288 F.2d 853, 865 (D.C. Cir. 1961), expressed the matter thusly:

> While philosophers, theologians, scientists and lawyers have debated for centuries whether such a thing as "free will" really exists, society and the law have no choice in the matter. We must proceed, until a firm alternative is available, on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct and that they are influenced by society's standards as well as by personal standards.

Note

[90] This Article describes the Administration's proposed treatment of detained defendants as "punishment," for it is the expression of community condemnation rather than any necessarily retributive purpose that characterizes a particular disability as punishment. As the Supreme Court said in striking down Congress' attempt to prohibit Communists from holding union office:

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

United States v. Brown, 381 U.S. 437, 458 (1965). *See also* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

Thus, although the desire to prevent future offenses obviously informs much of our law,[31] there are important respects in which the Administration's proposal goes beyond any of the precedents cited in its support. The crucial question is whether, in so doing, it goes beyond what the Constitution allows.

## THE DUE PROCESS CHALLENGE

Any assessment of the constitutional validity of pretrial detention that is designed to prevent anticipated crimes must confront the due process challenge to such confinement. Since the Petition of Right of 1628,[32] it has been clear that the promise of the Magna Charta "that no man . . . shall be . . . taken nor imprisoned . . . without being brought in answer by due process of law" [33] applies to imprisonment before, as well as after, conviction.[34]

Due Process

### *Application of the Attorney General's Test*

Even under the Attorney General's conception of due process as no more than a mandate for reasonable compromise, it is difficult to regard the proposed legislation as a serious effort to balance the interests of the accused with the claims of society. Mr. Mitchell concedes that due process requires "value judgments . . . concerning the degree of harm to be anticipated from particular categories of defendants."[35] Surely he is correct—yet the President's proposal says absolutely nothing about the sort of harm the defendant must be found likely to commit before he can be imprisoned pending trial. Once it is predicted that "no condition or combination of conditions of release will reasonably assure the safety of any other person or the community,"[36] confinement is authorized so long as the accused falls into any detainable category. Under this standard, the fear of political disruptions[37] or of trivial property offenses may be deemed sufficiently threatening to warrant preventive imprisonment. No tenable concept of due process could condone a balance that gives so little weight to the accused's interest in pretrial liberty.

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[31] A preventive purpose is evident in the substantive definitions of many offenses "so defined that their commission does not rest on proof of the occurrence of the evil that is the object of the law to prevent." MODEL PENAL CODE art. V, Comment 24 (Tent. Draft No. 10, 1960). A similar purpose is at work in criminal legislation penalizing recidivists more heavily than first offenders. *See* Note, *Court Treatment of General Recidivist Statutes*, 48 COLUM. L. REV. 238 (1948). And, as Blackstone put it, "[I]f we consider all . . . punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes than to expiate the past." 4 W. BLACKSTONE, COMMENTARIES *251-52.

[32] 3 Car. 1, c. 1.

[33] Confirmation of Magna Charta, 28 Edw. 3, c. 1 (1354).

[34] The Petition of Right emerged from the Parliamentary debates that followed the decision in Darnel's Case, 3 How. St. Tr. 1 (1627) (the debates appear immediately following, *id.* at 59-234 (1628)), where the King's Beach had denied pretrial release to five knights committed by command of Charles I. The judges had accepted the Attorney General's argument that only imprisonment pursuant to final prosecution must be by "due process of law" within the meaning of Magna Charta. The argument of Lord Coke prevailed in Parliament, however, and it was resolved that henceforth "no freeman in any such manner . . . [shall] be imprisoned or detained." *Id.* at 224, ¶ X. Thus the period between arrest and trial, which the United States Supreme Court has long recognized as "perhaps the most critical period of the proceedings," Powell v. Alabama, 287 U.S. 45, 57 (1932), came within the purview of the Great Charter. Pretrial liberty could no longer be denied without "due process of law."

minor crimes cause the detention?

Moreover, even the Attorney General's notion of due process as the embodiment of enlightened compromise concedes the critical importance of minimizing "the chance that an innocent defendant who is not dangerous will be detained."[38] Yet the proposed legislation's safeguards of reliability are more illusory than real.[39] Although the proposal purports to reduce the risk of preventive detention based on a groundless accusation by providing that the judge must first find "a substantial probability that the person committed the offense [charged],"[40] it imposes no such requirement when the accused is claimed to have attempted to threaten, injure, or intimidate any prospective witness or juror.[41] In no case would the proposal require that an indictment be returned prior to the decision to detain, or that the judge find conviction to be likely. Particularly in light of the long tradition of judicial deference to prosecutorial discretion at the charging stage, requiring a judicial finding of a "substantial probability" of guilt is unlikely to provide any real protection for the individual who finds himself unjustly accused. Indeed, such a finding might well be detrimental to him, for it would induce the public to perceive his pretrial incarceration as "beginning what is in substance a mandate of punishment."[42]

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[35] Mitchell, *supra* note 2, at 1235.

[36] H.R. 16196, 91st Cong., 2d Sess. § 23-1322(a) (1970).

[37] See note 7 *supra*.

[38] Mitchell, *supra* note 2, at 1239.

[39] Whether the procedures established by the proposed legislation are constitutionally deficient in other respects, *cf. In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605, 610 (1967), is beyond the scope of this Article.

[40] H.R. 16196, 91st Cong., 2d Sess. § 23-1322(b)(2)(C) (1970).

[41] *Id.* § 23-1322(a)(3).

Even if a defendant is certain to be convicted, this certainty does not imply ipso facto that he is likely to constitute a danger to the community if released. In obvious recognition of the inability to predict with even the slightest confidence which defendants would pose such a threat, the Administration's proposal does not attempt to deal with every defendant, but focuses instead on selected categories of defendants considered especially high risks because of their prior records or present charges. Of course, there would be a tendency to resolve doubts within these categories in favor of detention, in part because judges could thereby make fewer demonstrable mistakes, and in part because it would be extraordinarily difficult to make predictive distinctions among persons with similar records and charges. Indeed, it has been noted that "nothing in the D. C. statistics or any others now available indicate [*sic*] that those defendants who did commit crimes while released were distinguishable beforehand from other defendants who had similar records and charges but who did not commit crimes while released."[43] Nor does an examination of the categories created by the proposed legislation yield much basis for confidence.

The President's proposal would make it possible to detain any person charged with "a crime of violence" who is a narcotics addict,[44] or who is alleged to have committed his offense while he "was, with respect to another crime of violence, on bail or other release,"[45] or who "has been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is presently charged."[46]

But the proposed law fails to require any finding concerning the strength of the evidence on the prior charge in the case of an offense alleged to have been committed while on bail, and it includes as "crimes of violence" such offenses as "attempting to take immoral, improper, or indecent liberties" with a person under sixteen, all attempted robberies, and "assault with intent to commit any offense."[47] Thus, a person convicted of indecent exposure in 1960 and charged with purse-snatching in 1970 is among the President's "hard core recidivists."

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[42] United States v. Alston, 420 F.2d 176, 180 (D.C. Cir. 1969). See note 30 *supra*.

[43] ABA STANDARDS REPORT, *supra* note 5, at 68.

[44] H.R. 16196, 91st Cong., 2d Sess. § 23-1323 (1970).

[45] *Id.* § 23-1322(a)(2)(ii).

[46] *Id.* § 23-1322(a)(2)(i).

[47] *Id.* § 23-1331(4).

And the proposal is not limited to recidivists alone. It also provides that a defendant never before charged or convicted of any offense may be detained if the present charge is for a "dangerous crime,"[48] a category including such offenses as "attempting to take property from another by . . . threat of force," "unlawfully . . . attempting to enter any [dwelling or place of business] with the intent to commit an offense therein," "attempting to take immoral, improper, or indecent liberties" with a person under sixteen, and unlawfully selling "a narcotic or depressant or stimulant drug."[49]

Those who wonder why a first offender in such cases should be deemed particularly threatening are assured by Mr. Mitchell that the lack of a criminal record in these categories probably signifies that the accused managed to elude apprehension during his earlier ventures into crime.[50] One is reminded of General DeWitt's remarkable argument that the subversive threat posed by Americans of Japanese descent on the West Coast after Pearl Harbor was confirmed by the sinister absence of any overtly subversive activities in that area.[51] One might also recall the King's reply to the Knave in *Wonderland* who, denying that he had written a certain document, pointed to the absence of any "name signed at the end." "If you didn't sign it," the King answered, "that only makes the matter worse. You *must* have meant some mischief, or else you'd have signed your name like an honest man."[52] Any detention scheme spun on this sort of logic reflects less than a responsible concern for minimizing the incidence of erroneous imprisonment.

Wonderland again

Finally, the proposed legislation fails to satisfy the last criterion that the Attorney General concedes is implicit in due process: It does not "minimize, as far as practicable, the burdens of pretrial detention."[53] Those burdens not only include deprivation of liberty, but they also encompass the diminished ability to prepare one's defense, the public stigma of having been found too dangerous to release (a stigma that could itself prejudice subsequent proceedings) and, more often than not, severe economic hardships for the accused and his family.[64] Although the proposal allows private consultation between the accused and his counsel[65] and permits the temporary release of the accused to prepare his defense, it does so only "for good cause shown" and "in the custody of . . . [an] appropriate person."[66] These limitations could easily be applied to frustrate the defendant's ability to seek out witnesses unhampered by the presence of a conspicuous federal agent and unconditioned by the required disclosure of defense strategy.

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[48] *Id.* § 23-1322(a)(1).

[49] *Id.* § 23-1331(3).

[50] Mitchell, *supra* note 2, at 1236.

[51] J. DeWitt, Final Report, Japanese Evacuation From the West Coast, 1942, at 34 (1943, released 1944).

[52] L. Carroll, Alice's Adventures in Wonderland 182 (MacMillan & Co. ed. 1866).

[53] Mitchell, *supra* note 2, at 1235.

The proposal suggests that persons preventively detained might be confined "in facilities separate from convicted persons," but it does not guarantee such treatment and simply indicates that separate facilities will be employed "to the extent practicable."[67] And, although an existing statute allows defendants to credit their period of pretrial detention towards service of their sentences if they are convicted,[68] the proposed act does not provide for the compensation of unjustly detained defendants who are ultimately acquitted. If the Government were truly concerned with striking a fair balance between costs to the accused and benefits to the community, one would expect at least some recognition of the need to pay for an erroneous deprivation of liberty, not only to redress the wrong done, but also to discourage excessive use of the preventive scheme.[69]

In sum, even the Attorney General's utilitarian concept of due process demands significantly more than the President's legislation provides—more care to tailor the instances of preventive confinement to the specific kinds of danger anticipated, more assurance that neither innocent nor harmless persons will be detained, and more effort to mitigate the burdens of imprisonment for those who are eventually acquitted as well as those who are ultimately convicted.

Suppose, then, that after appropriate study and experimentation the proposed legislation were markedly improved in these deficient areas. The Administration might then contend that it had finally struck a constitutionally acceptable balance between the personal costs and social benefits of its proposal. At that juncture, it would be necessary to ask a more fundamental question: Does due process permit the *kind* of balancing on which even a greatly improved system of pretrial preventive detention would have to rest?

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[64] *See* ABA STANDARDS REPORT, *supra* note 5, at 2-3.

[65] H.R. 16196, 91st Cong., 2d Sess. § 23-1321(h)(2) (1970).

[66] *Id.*

[67] *Id.* § 23-1321(h)(1).

[68] 18 U.S.C. § 3568 (Supp. IV, 1969), *amending* 18 U.S.C. § 3568 (1964).

[69] *See generally* Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, 256-67 (1968).

### *Analysis of the Attorney General's View of Due Process*

The Attorney General's affirmative reply to the question just posed is premised on the view that, considering the nature of the harms prevented and the extent of the hardship inflicted, due process requires only an acceptably low ratio of erroneous to correct confinements. At first, this position may not seem controversial. Indeed, scholars sensitive to questions of personal liberty have taken a similar approach in assessing the justifiability of preventive detention. For example, Professor Alan Dershowitz recently framed the issue in terms of "how many defendants we should be willing to confine erroneously in order to prevent how many acts of violence."[60]

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Implicit in this formulation, however, is the assumption that the answer will be something more than zero. After all, Mr. Mitchell argues, "due process of law requires fundamental fairness, not perfect accuracy."[61] And Professor Dershowitz points out that even when "we establish rules for convicting the guilty, we do not require certainty; we only require that guilt be proved 'beyond a reasonable doubt.'"[62] This may suggest that society is "willing to tolerate the conviction of some innocent suspects in order to assure the confinement of a vastly larger number of guilty criminals."[63] The obvious corollary is that society should be willing to tolerate the preventive imprisonment of some innocent individuals in order to avoid the occurrence of an appropriately larger number of violent offenses.

But in precisely what sense does our society willingly tolerate the conviction of innocent individuals in order to confine the guilty? When we say "better that ten (or a hundred) guilty men go free than that one innocent man be condemned," do we thereby suggest that we would countenance the deliberate conviction of one innocent man to prevent the erroneous acquittal of twenty (or two hundred) guilty ones? Surely these celebrated formulas[64] do not mean that society may knowingly sacrifice innocent men so long as the terms of the trade are sufficiently favorable to the community as a whole. These aphorisms speak in the language of ratios, but we mistake their significance if we understand them to deny the fundamental postulate that deliberately to punish a man of whose guilt we feel unsure is wrong. Whatever the resulting social gain, such action is morally and constitutionally reprehensible. Given a system known to contain imperfections, there is a qualitative difference between the outcome of erroneously convicting a man when the trier has been fully convinced of his guilt and the outcome of erroneously convicting a man when the trier has reason to believe that he may be innocent. In the first of these situations, the trier is not called upon to make an explicit decision to risk morally condemning and punishing an innocent man. In the second situation such a decision is required; it cannot be made without greatly undermining society's commitment to the dignity of the individual as an end in himself.[65]

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[60] Dershowitz, *Preventive Detention: Social Threat*, TRIAL, Dec.-Jan. 1969-70, at 22, 24. *See also 1969 Hearings*, *supra* note 3, at 174, referring to the "constitutional ratio" of erroneous to correct confinements.

[61] Mitchell, *supra* note 2, at 1242.

[62] Dershowitz, *supra* note 60, at 22.

[63] *Id.*

[64] Hale remarked that five guilty men should be acquitted before one innocent man is convicted. 2 M. HALE, PLEAS OF THE CROWN *289 (1694). Blackstone raised the ratio

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to ten to one. 4 W. BLACKSTONE, COMMENTARIES *358. Others have favored still higher ratios. *See generally* G. WILLIAMS, PROOF OF GUILT 186-90 (3d ed. 1963).

[65] The distinction between these two outcomes is in some ways related to a distinction that has received attention with respect to

> the apparent anomaly that we are prepared to expend far greater resources in saving the lives of known persons in present peril [*e.g.*, a few men trapped in a mine shaft], than we are prepared to devote to measures that will avert future dangers to persons perhaps unknown or not yet even in existence.

Fried, *The Value of Life*, 82 HARV. L. REV. 1415, 1416 (1969). In the setting of the criminal trial, the analagous proposition would be that we try harder to avoid the punishment of a particular innocent defendant in visible peril of imminent erroneous conviction than we do to avert future dangers to innocent persons generally, including prospective defendants as well as prospective victims of crime. Even if one accepts Professor Fried's conclusion that a preference for allocating life-saving resources to known persons in present peril can only be justified to the extent that it in fact maximizes total lives saved in the long run (discounting future lives as appropriate in light of increasing uncertainty), one must be wary of applying in the present context Professor Fried's rejection of the argument "that in showing some preference in the case of the person in immediate peril, we demonstrate the value we place on human life." *Id.* at 1425. *See* Calabresi, *Reflections on Medical Experimentation in Humans*, DAEDALUS 387 (Spring 1969); Schelling, *The Life You Save May Be Your Own*, in PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS 127-62 (S.B. Chase ed. 1968).

Professor Fried's view is that one cannot justify as symbolizing the concern for human life a strategy that does less than it might to maximize lives saved or spends more on human life than it is in fact worth in relation to other values. Fried, *supra*, at 1425. But at least in the context of a criminal trial, one can justify some such strategy. If a refusal to convict in the face of visible uncertainty subjects a few more innocent individuals to injury in the long run than would a more tough-minded attitude toward criminal trials, the great virtue of such a refusal is that it reinforces society's ability to resist the temptation to treat innocent individuals as ultimately expendable when the "total good" can be enhanced by their sacrifice—the sort of treatment that trans-

Thus one cannot adequately describe the characteristics of a criminal process by comparing its frequency of erroneous imprisonments to its frequency of erroneous releases. Indeed, of several possible systems of criminal justice, the one that yields the fewest erroneous confinements might still be the most unjust: if its errors were to reflect deliberate decisions to ignore doubts as to guilt, the system would be no more tolerable than if those errors reflect a systematic bias against racial or political minorities. The final balance sheet obviously matters, but the *process* by which it is achieved matters more. Indeed, the very enterprise of formulating a tolerable ratio of false convictions to false acquittals puts an explicit price on an innocent man's liberty and defeats the concept of a human person as an entity with claims that cannot be extinguished, however great the payoff to society.[66]

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gresses first principles of mutual respect and common humanity. And if a refusal to run a calculated risk of punishing an individual whose guilt seems in doubt costs society more than the liberty of innocent men is in fact "worth" in some objective sense, one cannot ignore the problem of the typical, imperceptive observer who will regard a visible decision to condemn in the face of such doubt as a lesson that the sacrifice of an innocent man is not so serious a matter, however clearly he may be told that a strategy of minimizing total injuries to the innocent is in fact being pursued.

[66] The misleading tendency to regard the concept of "guilt beyond a reasonable doubt" as an inarticulate effort to express an essentially mathematical measure of how many innocent men we are willing to convict, *see, e.g.*, Finkelstein & Fairley, *A Bayesian Approach to Identification Evidence*, 83 Harv. L. Rev. 489, 504 (1970); *see also* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165, 183 (1969), finds its most recent and sophisticated expression in several attempts to apply to the factfinding process the methods of an emerging field known as statistical decision theory. The most readable account of the basic theory is H. Raiffa, Decision Analysis (1968).

Using decision theory, a number of legal scholars have tried to formulate a more rational model of the criminal trial than the less formalized, more intuitive materials familiar to lawyers seem to have provided. They propose that a criminal trial can usefully be viewed as analagous to any other process in which one must chose between two or more courses of action on the basis of a body of data which reduces, but does not wholly eliminate, the decision-maker's uncertainty about the "true state of the world," and about the consequences in that world of any chosen strategy of conduct. *See, e.g.*, Cullison, *Probability Analysis of Judicial Factfinding: A Preliminary Outline of the Subjective Approach*, 1969 Toledo L. Rev. 538, 563-68; Kaplan, *Decision Theory and the Factfinding Process*, 20 Stan. L. Rev. 1065, 1066-83 (1968).

Building on this model, these scholars suggest that the rational trier would vote to convict (or detain) rather than acquit (or release) whenever the "expected utility" of the former action would exceed the "expected utility" of the latter, much as a rational gambler would prefer the bet that would maximize his expected gains, taking into account his present position, his needs and his attitudes toward risk. Thus the trier would first decide how much he would like or dislike each of the four possible outcomes of the proceeding (convicting or acquitting a guilty man, convicting or acquitting an innocent man). After assigning quantitative "utilities" to each of these four outcomes, This argument does not imply that we do or should insist on absolute certainty; we properly instruct juries to convict if they believe that guilt has been established "beyond a reasonable doubt" rather than "beyond all doubt." We do so, however, only because total certainty is incompatible with the human condition, and we do not wish to immobilize the system by demanding the impossible.[67] Thus, guilt beyond a reasonable doubt represents not a lawyer's fumbling substitute for a specific percentage, but a standard that seeks to come as close to certainty as human knowledge allows—one that refuses to take a deliberate risk of punishing any innocent man.

The first time it was squarely confronted with the issue,[68] the Supreme Court explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[69] The

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the trier would arrive at a measure of the regret he would feel at convicting an innocent man (the difference between the utility of acquitting him and the utility of convicting him) and the regret he would feel at acquitting a guilty man (the difference between the utility of convicting him and the utility of acquitting him). According to the proposed model, the trier would then convict if and only if he regarded the probability of the defendant's guilt (P) as sufficiently high that this probability, when multiplied by the trier's regret at erroneous acquittal, would yield a product exceeding the corresponding probability of innocence (1-P) multiplied by the trier's regret at erroneous conviction.

If the utility of convicting a guilty man is designated U(C,G); the utility of convicting an innocent man, U(C,I); the utility of acquitting a guilty man, U(A,G); and the utility of acquitting an innocent man, U(A,I), then the decision-maker in this model would prefer conviction to acquittal if and only if $P(U(C,G) - U(A,G))$ exceeds $(1-P)(U(A,I) - U(C,I))$, which is the case if and only if P exceeds the quotient:

$$\frac{1}{1 + \dfrac{U(C,G) - U(A,G)}{U(A,I) - U(C,I)}}.$$

The most glaring of the many difficulties with this model is its assumption that the decision-maker should have some fixed attitude toward an event like "convicting an innocent man" or "acquitting a guilty man," events that cannot be evaluated apart from the process that produces them. Furthermore, the model can be shown to posit the wrong decision-maker, to confuse ends with means, and to ignore a variety of crucial values. These and related problems will be explored in a more extensive essay by the author on the potentialities and dangers of mathematical methods and models in the trial process.

[67] *See generally* G. Williams, The Proof of Guilt 154 (2d ed. 1958); Fridman, *Standards of Proof*, 33 Can. B. Rev. 665, 670-72 (1955); McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 257-58, 264-68 (1944).

[68] *In re* Winship, 397 U.S. 358 (1970).

[69] *Id.* at 364.

Court reached this conclusion in a juvenile case that resembled preventive detention in that the state had denominated the proceeding civil rather than criminal and had not conceived its design as inflicting punishment. The Court insisted that, these factors notwithstanding, "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[70] The Court found it critical that people not be left "in doubt whether innocent men are being condemned," in part because such doubt would dilute "the moral force of the criminal law" and in part because it would impair the confidence of "every individual going about his ordinary affairs . . . that his government cannot adjudge him . . . a criminal . . . without convincing a proper factfinder of his guilt with utmost certainty."[71] The Court evidently recognized that it would be incompatible with these purposes to treat the reasonable doubt standard as a mere probabilistic device to assure a sufficiently low frequency of erroneous convictions, for it expressly rejected any concept of reasonable doubt that would call for an "abstract weighing of the evidence"[72] without regard to its effect in bringing the trier of fact to a "subjective state of certitude on the facts in issue."[73] If due process stood for less than this demand for "moral certainty,"[74] there would be no stopping point to the principle of sacrificing innocent individuals, and the basic security conferred by a system that promises never to punish in the face of real doubt would be irreparably eroded.

Yet the President's proposal, however carefully administered and imaginatively refined, would inevitably imprison a significant number of innocent individuals who would, if released before trial, have been completely harmless. Indeed, in *every* case, a substantial risk of erroneous condemnation would be inescapably clear to those with authority to confine the accused. Their only uncertainty would be precisely how often this risk would result in mistaken punishment. Part of the uncertainty would be resolved by the system's operation; society would witness the ultimate acquittals of men who had been wrongly imprisoned for weeks or months before they could finally establish their innocence at trial. A significant part of the uncertainty would remain unresolved, however, for no one could ever feel wholly satisfied that even those detained men who were eventually convicted had not been imprisoned before trial on the basis of erroneous predictions of future criminality. A dip in the crime rate cannot justify such calculated and obvious injustice. To institute a scheme that condemns and incarcerates unconvicted defendants in order to prevent unspecified crimes, in the face of what will inevitably be a grave doubt *in each case*, is to approve the proposition that deliberately risking the punishment of some individuals who have committed no offense, and would commit none even if released, is an acceptable means to the end of reducing crime. Due process of law should not tolerate that compromise.

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[70] *Id.* at 363-64.

[71] *Id.* at 364.

[72] *Id.* at 368, *quoting* Dorsen & Rezneck, *In re Gault and the Future of the Criminal Law*, 1 FAMILY L.Q. No. 4, at 26-27 (1967).

[73] *Id.* at 366, *quoting* Dorsen & Rezneck, *supra* note 72, at 26. Although Mr. Justice Harlan's concurring opinion did stress the impossibility of ever acquiring "unassailably accurate knowledge of what [in fact] happened," *id.* at 370, and did emphasize the statistical importance of the reasonable doubt standard in influencing "the comparative frequency of [the] two types of erroneous outcomes," *id.* at 371 there was no suggestion in that opinion, and certainly none in Mr. Justice Brennan's opinion for the Court, that due process would be satisfied by a standard that directed the trier to convict whenever the evidence was such that sufficiently few innocent men would be erroneously condemned if guilty verdicts were returned each time the evidence seemed as strong.

[74] *See* Wilson v. United States, 232 U.S. 563, 569-70 (1914).

### *Individualized Criminality*

Apart from the statute's calculated sacrifice of innocent individuals, the factual determinations involved in pretrial detention raise other perplexing questions under the due process clause. These determinations at first appear to treat the suspect more as a member of a class than as a unique person. To be detained, the accused must be found representative of a particularly recidivous category, inevitably defined in such terms as prior record, present charge, economic status or educational level. As Professor Ronald Dworkin has stated: "The prediction . . . must be actuarial, like the prediction an insurance company makes about the likelihood of teenagers to have automobile accidents."[75] Professor Dworkin's conclusion is that pretrial preventive detention is necessarily unjust; it is wrong "to put someone in jail on the basis of a judgment about a class, however accurate, because that denies his claim to respect and treatment as an individual."[76]

class judgment: class of dangerous individuals

At first, this position appears to be an attractive one, deeply consonant with the values of personal dignity and individual worth. On closer analysis, however, it becomes clear that Professor Dworkin's argument is untenable in the form stated here, for the peculiar and paradoxical vice of preventive detention is that it treats the suspect too *much* as an individual, and not *enough* as a member of a class.

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[75] Dworkin, *Morality and the Law*, N.Y. Rev. of Books, May 22, 1969, at 29, 33.

[76] *Id.*

The broad principle that it is wrong to treat persons collectively rather than as unique individuals cannot be maintained. No legal system could function without often disregarding individual distinctions; no injustice inheres in treating a person in some contexts as a nonresident, in others as a teenage driver, in still others as a male employee, disregarding in each instance all those personal characteristics which are reasonably deemed irrelevant to the law's purpose. Even in the criminal law, with moral condemnation at stake, we almost always treat people as members of groups, deliberately disregarding many, if not most of their unique characteristics as individuals. We decide, for example, that most persons who attempt robbery unsuccessfully are so likely to pose a continued threat that all persons in this category should be regarded as criminals,[77] although some undoubtedly would pose no threat at all. We decide that so many of the persons who possess burglar's tools are likely to make antisocial use of them that possession itself should be a crime,[78] although we thereby treat the well-meaning possessor as a member of a class whose features he does not wholly share. And we adopt laws that penalize repeaters more heavily than first offenders[79] on the basis of certain assumptions about the characteristics of recidivists as a class, assumptions that might prove false as applied to particular individuals.

Some will protest that, when we find a man guilty of a crime, we at least make an additional "judgment entirely about what [that] particular person did,"[80] a judgment different in kind from the preliminary legislative conclusion about the class of people who engage in the proscribed category of conduct. But this final judgment typically represents little more than an effort to determine whether the facts make the person charged a member of the class punishable by law—something the Administration's proposal does as well.[81]

Additionally, we often base sentencing judgments on information about how the class of people who share the defendant's prior record and general background are likely to behave. But sentencing is instructive for another reason, for the decision of how to treat a person already convicted of a criminal offense is one that we frequently attempt to personalize by taking into account all we know about the individual.[82] Yet one must not conclude too quickly that such attempts reflect a general ideal of personalized treatment. There is a world of difference between making the *punishment* fit the criminal in this way and making the *crime* fit the criminal by fully personalizing the grounds on which we decide whether to regard a man as an offender in the first instance.

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[77] *E.g.*, D.C. Code Ann. § 22-2902 (1967); *cf.* Ohio Rev. Code Ann. § 2901.24 (Page Supp. 1969) (assault with intent to commit robbery).

[78] *E.g.*, Ark. Stat. Ann. § 41-1006 (1964) (possession or manufacture); *cf.* N.Y. Penal Law § 265.05 (McKinney 1967) (possession of machine gun or like weapons a felony).

[79] *E.g.*, D.C. Code Ann. § 22-104 (1967); Mass. Gen. Laws Ann. ch. 279, § 25 (1968).

[80] Dworkin, *supra* note 75, at 33.

[81] H.R. 16196, 91st Cong., 2d Sess. § 23-1322(b) (1970).

Nevertheless, Professor Dworkin is right when he says that a criminal conviction traditionally entails "a judgment entirely about what a particular person did."[83] Stressing the word "did" rather than the word "particular" reveals the heart of a major objection to preventive justice of the sort advocated by the President and Mr. Mitchell. Because imprisonment on grounds of dangerousness is predicated on a finding about the sort of person the defendant *is* rather than a finding about the sort of thing he has *done*, it has all the vices inherent in a law that makes the crime fit the criminal—a law that is too personal in application to meet the fundamental requirement that punishment may be inflicted only if it has been made clear in advance precisely what one must do to trigger its imposition and precisely how one can avoid doing so.

### *Problems of Proof*

To every man, the suggested system of preventive detention makes this threat: Even if you have never before been charged or convicted of any offense, you may be jailed for sixty days[84] as a criminal menace to public safety simply because a judge finds a "substantial probability"[85] that you have committed any of nine "dangerous crimes"[86] and finds that "no . . . conditions of release will reasonably assure the safety of any other person or the community."[87] If at the end of sixty days you are not ready to present your defense, your confinement will last as long as you find it necessary to delay your trial.[88] If you are tried and acquitted, you may be subjected to the same process again on a new charge.[89] And if you have been convicted of any of fifteen "crimes of violence" at any time in the past decade, your liability to such incarceration becomes broader still.[90]

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[82] *See, e.g.*, Williams v. New York, 337 U.S. 241, 247-48 (1949).

[83] Dworkin, *supra* note 75, at 33.

[84] H.R. 16196, 91st Cong., 2d Sess. § 23-1322(d)(2) (1970).

[85] *Id.* § 23-1322(b)(2)(C).

[86] *Id.* §§ 23-1322(a)(1), 23-1331(3).

[87] *Id.* § 23-1322(a).

[88] Any detained person is entitled to be processed under the bail provisions of the new act, *id.* § 23-1321, "upon the expiration of sixty calendar days, *unless the trial . . . has been delayed at the request of the person.*" *Id.* § 23-1322(d)(2)(A) (emphasis added).

The real vice of the accusation of dangerousness underlying this proposed statutory scheme is not that it looks to the future but that its content is so amorphous. Imagine again the impact on the accused. He is told: There is a substantial probability that you have committed a crime and that your release would endanger the community in some unspecified way. We know you can control your behavior, for we are about to try you as a criminal, but we do not trust you to refrain from crime. How could the accused possibly respond? Would he not feel, with Kafka's bewildered hero in *The Trial*, that the completion of a responsive "plea was a sheer impossibility?"[91] For the accused to meet this open-ended and ultimately personalized sort of "accusation . . .the whole of [his] life would have to be recalled to mind, down to the smallest actions and accidents, clearly formulated and examined from every angle."[92]

Mr. Mitchell contends that "[t]he burden of proof of dangerousness would, of course, rest upon the Government."[93] The proposed statute, however, says no such thing, and even if it did the words would be meaningless. Once the Government shows that the accused may well be guilty of the pending charge and has previously been charged with a similar crime, it has made a plausible case for suspecting possible danger. The burden will, for all practical purposes, shift to the accused, who will be able to offer nothing more than general assurances of his own good intentions. If those assurances are believed and the accused released, the matter is forgotten unless he is implicated in a future crime. But if the accusation of dangerousness is accepted and the accused detained, he can never fully establish that it would in fact have been safe to release him, even if he is later acquitted. Any law that places defendants in so hopeless a procedural posture while holding out the promise that they can somehow win their freedom seems inconsistent with due process.

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[89] Nothing in H.R. 16196 would limit the number of times a defendant could be detained, apart from the requirement that each charge reflect "a substantial probability that the person committed the offense for which he is present before the judicial officer." *Id.* § 23-1322(b)(2)(C).

[90] *Id.* §§ 23-1322(a)(2)(i), -1331(4).

[91] F. KAFKA, THE TRIAL 161 (W. Muir & E. Muir transl. 1957).

[92] *Id.*

[93] Mitchell, *supra* note 2, at 1238.

### *Punishment of Status*

The consequences of the proposed law outside the courtroom raise even more fundamental objections. The proposed statute would undercut each man's control over his own fate and substitute the oppressive control of discretionary authority, for every man would have cause to fear that he might be labeled a likely criminal and imprisoned for at least two months for reasons ultimately beyond his control. Although one who is willing to obey society's commands can so order his life as to be virtually certain that he will never be found guilty beyond a reasonable doubt of any specific criminal act, a man cannot possibly achieve the same measure of assurance that no judge will ever find a "substantial probability" that he has committed an offense, and no man can so pattern his conduct as to feel secure that he will never be thought to pose a danger to "any other person or the community."

If the proposed statute required clear and convincing evidence that the potential detainee would commit a specific crime involving a specified victim, accusations under it would be easier to meet, and its impact on primary conduct would be less oppressive. Presumably such evidence would have to include repeated attempts or explicit threats; most men can conduct their lives so as to prevent such evidence from arising.[94] But cases in which the likely commission of a specified crime can be demonstrated are rare in the extreme and represent a miniscule fraction of the situations to which the Administration's proposal would apply. Typically, the only charge would be that the defendant seems to have committed a crime and is probably too dangerous to release.

A world in which any man, through his own misstep or another's malice, could find himself entangled in a degrading trial and ultimately imprisoned as a criminal would be intolerable. For precisely that reason, we insist upon limiting the criminal law to enforceable rules about the specific conduct in which men may or may not engage rather than confining all persons with criminal propensities before their deeds are done.[95] The Administration's proposal departs from this tradition by permitting punishment to be triggered by circumstances other than convincing proof of conduct whose criminal consequences the actor could have known.

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[94] Such evidence was present in the case of a Texas defendant-who, while under indictment on at least eight offenses and out on bail, had not only threatened to kill a number of people but had shown his sincerity by shooting one in the eye and another in the back. Jailed because he was unable to raise a $35,000 peace bond, see text at notes 136-37 *infra*, he challenged the bond as excessive. Rejecting his claim, the appellate court recounted the story told by one lady to the trial judge. The lady had described the accused's threat to kill her and his behavior in firing upon several people in her home. Her equanimity was truly remarkable: "I didn't take it he meant he was going to kill me," she explained, "until he threw the bomb in my window." *Ex parte* Whatley, 136 Tex. Crim. 144, 146, 124 S.W.2d 357, 358 (1939).

In a variety of settings, the Supreme Court has found constitutional infirmities in laws sharing this basic vice. In *Robinson v. California*,[96] for example, the Court held it cruel and unusual punishment violative of the eighth amendment and the due process clause of the fourteenth Note.... amendment for a state to make it a crime to be a narcotics addict. The majority opinion discussed the inhumanity of treating the sick as criminals,[97] but the soundest explanation of the result is the proposition that "the criminal law ought to be presented to the citizen in such a form that he can mold his conduct by it, that he can, in short, obey it." [98] Due Note.... process forbids punishment that one has no assured way to avoid.

In *Lanzetta v. New Jersey*,[99] the Supreme Court overturned a law condemning as a criminal "[a]ny person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly Note.... person, or who has been convicted of any crime in this or in any other State." [100] Noting that "[a]ll are entitled to be informed as to what the State commands or forbids," [101] and that the challenged provision condemned no clearly defined act or omission, the Court concluded that conviction under the law could not be squared with the due process clause.[102] Again, the principle underlying the result is that a man should be condemned only for specific actions the criminal consequences of which he could have predicted.

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[95] *See* H. Packer, The Limits of the Criminal Sanction 73-102 (1968). *See also* H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 23, 47, 181-83 (1968).

[96] 370 U.S. 660 (1962).

[97] *Id.* at 666-67.

[98] L. Fuller, The Morality of Law 105 (1964). The Supreme Court's recent refusal to extend *Robinson* to the case of a chronic alcoholic convicted of public intoxication rested on an explicit recognition that *Robinson* implies not a broad immunity to punishment for disease-based behavior but simply a limitation of criminal penalties to *overt conduct* which society has an interest in preventing and which a specific law has prohibited. *See* Powell v. Texas, 392 U.S. 514, 533 (1968) (Marshall, J.); *id.* at 542-44 (Black, J., concurring). *See generally* Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv. L. Rev. 793 (1970).

[99] 306 U.S. 451 (1939).

[100] *Id.* at 452.

[101] *Id.* at 453.

It is important to recall that the proposed system of pretrial preventive detention would inflict punishment rather than merely impose a restraint, for it would imprison persons on the basis of a finding that, if given the opportunity, they would make a morally culpable choice to commit a crime.[103] Because the system would inflict such punishment on persons who could not have avoided it by conforming their conduct to laws clearly promulgated in advance, that system would deprive defendants of liberty without due process of law.

## EIGHTH AMENDMENT

The preceding arguments need not invalidate the Government's right to detain a defendant on the basis of persuasive reason to believe that, if released, he would frustrate the proceedings against him by fleeing, destroying evidence or intimidating witnesses or jurors. So long as the Government's fears relate to a particular anticipated event and are based upon highly specific evidence, a prediction of such activities would be analogous to a highly particularized claim that the defendant threatens to commit a specific crime.[104] However, courts have long inferred at least the risk of flight from evidence substantially less specific than is contemplated here,[105] and the question arises whether their having done so can be squared with the due process argument of the preceding section.

To some extent, the detention of a person as likely to flee or otherwise interfere with the proceedings against him entails far less a moral condemnation than a recognition of human frailty. Several years ago the Supreme Court employed an analogous rationale to distinguish a law prohibiting Communists from holding union office from conflict-of-interest statutes, reasoning that the latter, insofar as they expressed condemnation of anyone, condemned all men.[106] If this argument were truly persuasive, it might be used to justify detention to prevent flight or interference on the theory that such detention resembles civil commitment more than criminal punishment. By making bail-jumping or witness-intimidation a crime, however, we express the ultimate judgment that the accused is to be blamed if he chooses to frustrate the government's efforts to prosecute him. To that extent, the practice of pretrial detention to prevent flight or other interference in the absence of highly particularized evidence appears in conflict with the principles so far explored.

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[102] *Id.* at 458; *cf.* Stoutenburgh v. Frazier, 16 App. D.C. 229 (D.C. Cir. 1900) (invalidating a law making it a crime to be a "suspicious person"). *See also* Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968) (invalidating a vagrancy statute as impermissibly vague).

[103] See note 29 *supra*.

[104] See text at note 94 *supra*.

[105] *Cf.* United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969). The routine denial of bail in capital cases, for example, has reflected a willingness to infer risk of flight from the possibility of a death sentence without any further evidence about the defendant's background or previous conduct. See text at notes 16-24 *supra*.

! These are predictive and amorphous as well.

A partial reconciliation may be possible if one looks beyond due process to the one constitutional provision explicitly concerned with the problem of pretrial liberty—the excessive bail clause of the eighth amendment.[107] Operating in part to qualify and in part to amplify the general demands of due process, the constitutional prohibition against excessive bail points the way to a rounded doctrine of permissible and forbidden restraints between arrest and trial.

The eighth amendment's reference to bail implies a constitutional recognition of the Government's special interest in securing the presence of the accused at trial.[108] That interest has always been thought to justify the denial of bail in capital cases on the theory that persons on trial for their lives are under such pressure to flee that no further evidence of their likelihood to do so is necessary.[109] To the extent that the excessive bail clause imported this historic assumption into the eighth amendment, persons charged with capital offenses may be entitled to a less particularized showing of probable flight than other defendants may claim as a matter of due process.

For purposes of this Article, however, the central problem is expressed by the converse question: To what extent, if at all, does the excessive bail clause impose limits *beyond* those of due process on the exercise of governmental authority to detain non-capital defendants

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[106] United States v. Brown, 381 U.S. 437, 454 (1965).

[107] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[108] This interest is recognized as so compelling that bail probably cannot be deemed excessive simply because it exceeds the financial ability of the accused, so long as no lesser amount could reasonably assure his presence at trial. *See* Stack v. Boyle, 342 U.S. 1, 10 (1951) (Jackson, J., concurring); White v. United States, 330 F.2d 811, 814 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964); United States v. Hinton, 238 F. Supp. 230 (D.D.C. 1965).

[109] See text at notes 15-24 *supra*.

1st Congress

in order to prevent crimes between arrest and trial? The language of the eighth amendment is not particularly informative in this regard. The relevant part provides simply that "excessive bail shall not be required." Furthermore, the history of its adoption is not in the least illuminating. We know only that one Congressman found the proposed text curiously opaque: "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges?"[110] Beyond these forty-nine words, the proceedings of the First Congress record no discussion of the excessive bail clause. The same Congress enacted a statutory right to bail in non-capital cases,[111] but again no debate is recorded in either chamber.

The statutory right to bail and the constitutional prohibition against excessiveness seem to represent the culmination of two distinct lines of evolution. The statutory right may be traced through the Northwest Ordinance of 1787[112] to the Massachusetts Body of Liberties of 1641;[113] the constitutional prohibition is traceable through the Virginia Declaration of Rights of 1776[114] to the English Bill of Rights of 1689.[115] Why these two strands of history failed to converge in the First Congress remains something of a mystery.[116]

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[110] 1 ANNALS OF CONG. 754 (1789) (remarks of Representative Livermore).

[111] Judiciary Act of 1789, ch. 20, § 33(b), 1 Stat. 91: "[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . . ." The rule has long been embodied in FED. R. CRIM. P. 46(a)(1): "A person arrested for an offense not punishable by death shall be admitted to bail."

[112] An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, enacted July 13, 1787, provided in article II that "all persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great; all fines shall be moderate; and no cruel or unusual punishments shall be inflicted."

[113] "18. No mans person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." COLONIAL LAWS OF MASS. 37 (Whitmore ed. 1889).

[114] The Virginia Declaration of Rights, in clause 9, adopted verbatim the standard of the English Bill of Rights. See note 115 *infra*.

[115] 1 W. & M., c. 36, § 10, at 69 ("Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

[116] For a persuasive suggestion that the difference in phraseology between the excessive bail clause of the eighth amendment and the right to bail embodied in federal statute was entirely accidental, see Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 971-79, 982-89 (1965).

Given the murkiness of the constitutional text and its origins, it is not surprising that several distinct interpretations of the provision should have evolved. One view has been that the prohibition against excessive bail implies an underlying right to be admitted to bail in all cases, or at least all non-capital cases.[117] The principal competing view has been that the prohibition simply limits judicial abuse of the power to set bail in those cases where Congress has authorized that it be set.[118] Mr. Mitchell argues that "[w]hile the first of these two interpretations would prohibit pretrial detention of criminal defendants, the second would not."[119] But there remains a third possibility, more plausible than either of these. Before that possibility can be explored,[120] it is necessary to look more closely at Mr. Mitchell's argument.

Interpreting the 8th

① Rt. to Bail

② Cong. regulate bail

Noting that persons charged with a wide variety of offenses were not entitled to release on bail under applicable state or federal laws when the eighth amendment was adopted, the Attorney General properly concludes that the excessive bail clause cannot be read to imply an absolute right to pretrial release for all defendants.[121] This conclusion implies only that some governmental interests may justify the denial of pretrial liberty, and leaves open the question of which interests have this character. It is plainly a *non sequitur* to conclude, as does the Attorney General,[122] that the excessive bail clause leaves Congress entirely free to establish the circumstances under which pretrial release may be withheld. Under Mr. Mitchell's view, the excessive bail clause may be invoked by a defendant whose pretrial detention Congress has forbidden, and who claims that a judge is thwarting Congress's will by detaining him, but not by one whose pretrial detention Congress has required, and who claims that Congress had no valid reason to deprive him of his liberty. It makes no functional sense to give the clause this meaning, for the interests at stake, both the government's and the individual's, are identical whether a legislature or a court has made the basic decision resulting in the defendant's pretrial imprisonment. Moreover, this reading would render the excessive bail clause superfluous, since the due process clause standing alone would forbid the judicial imprisonment of a man specifically entitled to release under the congressional "law of the land." Furthermore, although an unlimited legislative power to define the boundaries of the citizen's rights may be consistent enough with the English theory of civil liberties,[123] in which Parliament is the ultimate authority, such power would be totally inconsistent with a Bill of Rights concerned almost exclusively with curtailing the powers of Congress. Finally, the other clauses of the eighth amendment, those prohibiting cruel and unusual punishments and excessive fines, have traditionally beer construed as limitations on legislative abuse.[124] In the absence of any historical or functional reason to construe it otherwise, the excessive bail clause should be interpreted to limit the circumstances in which pretrial liberty may be denied, by whatever branch of government.

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[117] *See, e.g.*, Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1960). *See also* United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926) (dictum); Dye v. Cox, 125 F. Supp. 714, 715 (E.D. Va. 1954); United States v. Fah Chung, 132 F. 109, 110 (S.D. Ga. 1904) (dictum); Foote, *supra* note 116, at 965-89.

[118] *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 545-46 (1952) (dictum); Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir.) (dictum), *cert. denied*, 376 U.S. 965 (1964); People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 397-98, 49 N.E.2d 498, 500 (1943); Vanderford v. Brand, 126 Ga. 67, 69, 54 S.E. 822, 823 (1906) (dictum).

[119] Mitchell, *supra* note 2, at 1224.

[120] See text at notes 138-56 *infra*.

[121] Mitchell, *supra* note 2, at 1230.

[122] *Id.* at 1224, 1230

Such an interpretation permits one to focus immediately upon what must, under any view of the clause, be the central inquiry: Precisely ③ what limits should the excessive bail clause impose on governmental power to incarcerate a man between arrest and trial? To answer that question, the Attorney General turns to English and colonial history, observes that persons charged with certain felonies were not admitted to release on bail at the end of the eighteenth century,[125] asserts without proof that the non-bailable offenses were "those which posed a substantial danger of injury or death to others,"[126] and concludes that "anticipated danger to other persons or the community was a substantial motivating factor in legislative decisions to make bail unavailable to certain classes of dangerous offenders."[127] Just as the Attorney General's parallel argument with respect to capital offenses proved to be lacking in historical support,[128] the view here quoted finds support neither in the historical materials cited by the Attorney General nor in any others thus far examined.

The most comprehensive compilation of the statutory and case law on the English bail system in the late eighteenth century nowhere suggests that fear of danger to the community before trial motivated the distinctions typically made between bailable and non-bailable offenses.[179] On the contrary, the underlying assumption seems to have been that certain classes of offenders, particularly those whose lives were at stake, ought to be detained simply to assure their presence at trial.[180] Pretrial release was more readily denied during this period in cases of particularly heinous crimes,[181] but the reason, apart from the fact that such offenses carried heavier penalties and therefore involved a greater temptation to flee, was the fear that persons guilty of especially atrocious offenses might well be killed before they could appear for trial.[182]

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[123] *See* Foote, *supra* note 116, at 969.

[124] *Id.* & n.46.

[125] Mitchell, *supra* note 2, at 1225-30.

[126] *Id.* at 1225.

[127] *Id.*

[128] See text at notes 14-24 *supra*.

Nor do the more ancient origins of the bail system support the hypothesis that pretrial detention was employed to protect the community from repeated crimes. The institution of requiring financial security of criminal defendants awaiting trial derives in part from a system of private contractual arrangements designed to assure that the victim's relatives would receive payment (wergeld),[183] and in part from a network of collective agreements whereby members of a community undertook to arrest any of their number who broke the law (frankpledge) and to secure the presence of such violators at trial (bail surety).[184] Nothing in this older history indicates a concern to prevent lawbreakers from causing further harm, as distinct from the desire to assure that they be brought to justice. On the contrary, even offenders who could not be bailed by local authority could be, and often were, released by order of the King when it was thought that private sureties would be more likely than the frequently corrupt local sheriffs to produce the accused for trial.[185]

The absence of any explicit reference to the fear of pretrial misconduct between the thirteenth and eighteenth centuries can hardly reflect an oversight. A fourteenth century English statute,[186] absorbed into the common law of the colonies and now reflected in many state statutes,[137] authorized judges to require, of all persons whose past behavior gave just reason to fear future misconduct, a secured pledge (peace bond) that they would behave lawfully. If the pledge was broken, the bond would be forfeited to the King, and if the required security was provided, the person could not be imprisoned. Given the availability of this explicit method of deterring misconduct, the conspicuous absence of any similar concern in the contemporaneous materials dealing with pretrial detention can only be taken to reflect an assumption that no special measures to prevent crime were thought warranted by the mere pendency of a criminal charge.

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[179] A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL; IN CIVIL AND CRIMINAL CASES (1783).

[180] *See id.* at 153, 156, 170, 199.

[181] *Id.* at 191.

[182] *Id.*

[183] E. DE HAAS, ANTIQUITIES OF BAIL 11-12 (1940).

[184] *Id.* at 12-27, 30-50.

[185] *Id.* at 51-57.

[186] The Statute of Westminster, 1361, 34 Edw. 3, c. 1, § 6, at 135 (1360), empowered the justices "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise for their good behavior towards the King and his people . . . to the intent that the people be not by such rioters troubled nor endamaged, not the peace blemished." *See* 4 W. BLACKSTONE, COMMENTARIES *252.

peace bond

The history of bail therefore suggests that, for a substantial period lasting at least until the adoption of the excessive bail clause, the only legitimate function of pretrial incarceration was to provide assurance that the accused could be prosecuted and, if guilty, sentenced. But our incomplete knowledge of the social and legal history of bail, coupled with our ignorance of the expectations of those who wrote the eighth amendment, would make exceedingly hazardous any attempt to deduce from history the appropriate scope of the right conferred by the excessive bail clause.

An examination of the contemporary purposes of the clause would prove more fruitful. The Supreme Court has explored those purposes only once, in *Stack v. Boyle*.[138] The twelve petitioners in that case had been charged with conspiring to violate the Smith Act. Bail had been fixed at $50,000 for each, and they were detained pending trial because they could not raise that amount. Holding that the bail fixed by the district court was excessive under the eighth amendment,[139] the Court began its analysis by noting that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[140] The Court added that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[141] Although the "right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty," bail "set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[142] Because there was no showing that amounts less than $50,000 could not have assured the presence of each accused at trial, the Court remanded the case for a new bail determination proceeding.[143]

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[137] *See* Note, *"Preventive Justice"—Bonds to Keep the Peace and For Good Behavior*, 88 U. Pa. L. Rev. 331 (1940); Note, *Peace and Behavior Bonds—Summary Punishment for Uncommitted Offenses*, 52 Va. L. Rev. 914 (1966). *See also* 18 U.S.C. § 3043 (1964), assimilating the peace bond provisions of the several states into federal law. The only reported cases invoking § 3043 or its predecessor, the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, are United States v. Greiner, 26 F. Cas. 36 (No. 15,262) (E.D. Pa. 1861), and *In re* Mineau, 45 F. 188 (D. Vt. 1891).

[138] 342 U.S. 1 (1951).

[139] *Id.* at 5-7.

[140] *Id.* at 4.

Oddly enough, the Attorney General fails even to discuss the holding of *Stack v. Boyle* in his review of the excessive bail clause.[144] Instead, he dwells at length on a dictum in *Carlson v. Landon*[145] to the effect that the "Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed," since the English Bill of Rights Act, from which the eighth amendment provision was adopted, was never thought to provide a right to bail in all cases, but merely to provide "that bail shall not be excessive in those cases where it is proper to grant bail."[146] The word "proper" is sufficiently ambiguous to beg the question involved here, and the bare majority in *Carlson*, in upholding the denial of bail to prevent sabotage by alien Communists pending deportation, indicated that it did not even regard the eighth amendment as clearly applicable to civil proceedings of the sort there involved.[147] Given the majority's emphasis, however misguided, on Congress' special power over resident aliens in cases touching the national security,[148] the opinion's brief remarks cannot be said to determine the reach of the excessive bail clause in criminal cases. Morever, as Professor Caleb Foote has shown, the majority clearly misunderstood the historical material to which it referred.[149] In any event, a decision denying the claims of Communists during the heyday of the McCarthy era is unlikely to give rise to enduring constitutional doctrine.

In sharp contrast to his extended discussion of *Carlson*, the Attorney General refers to *Stack* only in connection with his mention of the presumption of innocence, dismissing the Court's reliance on that presumption in *Stack* as "dictum."[160] In Mr. Mitchell's view, that presumption simply has no application to pretrial proceedings; if it did, he reasons, the practices of arrest, presentment and pretrial detention for those found likely to flee, intimidate witnesses or jurors, or otherwise interfere with the trial, would be impermissible.[161] This argument completely ignores the basic rationale underlying the decision in *Stack*. To secure the public interest in preventing certain forms of conduct, we have established a system of sanctions calculated to deter outlawed behavior. That system cannot function at all if the threatened sanctions are not effectively imposed, and various restraints on liberty, from arrest to detention, may at times be needed to provide assurance that a reliable trial can be held. Moreover, society may justly demand this assurance even if the defendant is innocent. Apart from the restraints needed to provide this basic assurance, however, a person awaiting trial has as great a right to liberty as any other citizen.[162]

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[141] *Id.*

[142] *Id.* at 4-5. *See also* United States v. Foster, 79 F. Supp. 422, 423 (S.D.N.Y. 1948).

[143] 342 U.S. at 5-7.

[144] Mitchell, *supra* note 2, at 1224-31.

[145] 342 U.S. 524 (1952).

[146] *Id.* at 545.

[147] *See id.* at 537, 544-45 & n.41.

[148] *Id.* at 534-37, 541, 544.

[149] See Foote, *supra* note 116, at 979 & nn.104-05.

presumed
innocence:
more
than a
rule of
evidence

Viewed in this perspective, the presumption of innocence of which the Supreme Court spoke in *Stack v. Boyle* represents far more than a rule of evidence. It represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community. Only those deprivations necessary to assure the progress of the proceedings pending against him—deprivations which do not rest on any assumption of guilt—may be squared with this basic postulate of dignity and equality.[163] If a defendant is to be subjected to preventive restraints beyond those necessitated by the pendency of criminal proceedings, they must be restraints to which all citizens are subject. The defendant's special status as an accused must not be allowed to trigger imprisonment that is not needed to effectuate the government's interest in prosecuting him to determine his guilt or innocence.[164]

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[160] Mitchell, *supra* note 2, at 1231.

[161] *Id.* at 1231-33.

[162] It is possible to argue, although the Attorney General does not, that pretrial detention to prevent future crimes furthers several of the functions of the pending prosecution—incapacitation, rehabilitation, even retribution and general deterrence—and thereby helps to effectuate the purposes of the conviction the government is seeking. But if the presumption of innocence of which the Court spoke in *Stack* is to mean anything, it must point to a fundamental distinction between restraints without which there could be no meaningful prosecution at all—restraints to which even the innocent may justly be subjected—and restraints that merely further the aims of convicting persons found to be guilty. It should not be surprising, therefore, that those courts that have been confronted with it have rejected any suggestion that, even pending appeal, bail may be denied for the purpose of inflicting a punitive sanction or deterring similar misconduct, both of which are broadly ancillary to the aims of the pending prosecution. *See, e.g.*, Reynolds v. United States, 80 S. Ct. 30 (Douglas, Circuit Justice, 1959); Davis v. United States, 345 F.2d 441, 444 (D.C. Cir. 1965) (Bazelon, C.J., concurring), *cert. denied*, 385 U.S. 868 (1966).

[163] A similar value helps to explain the fourth amendment requirement that a search of

To this extent, the excessive bail clause imposes more severe restraints on pretrial imprisonment than those imposed by the due process clause alone. Although due process might well permit preventive detention to restrain dangerously ill individuals,[165] or to restrain persons from committing specific crimes in circumstances of reiterated threats or attempts,[166] the prohibition against excessive bail should prevent the state from similarly restraining individuals simply because they are awaiting trial on criminal charges.

regulatory detention (see below)

Indeed, it is difficult to imagine any governmental interest unrelated to the integrity of pending proceedings that might justify singling out for special disabilities those persons charged with crime. It may be asserted that this group is more likely, as a class, to pose a threat of future criminal behavior. Certainly, however, there are persons not charged with any crime who give every indication of being at least as dangerous as anyone awaiting trial on a pending charge. If two men appear equally likely to commit a violent crime, it is arbitrary to imprison the man who is about to be tried for a past offense while imposing no restraint on the man who is not facing trial. Nor is it easy to explain why a man subjected to preventive confinement before trial should suddenly become immune to such detention upon acquittal. When a preventively detained defendant has been acquitted, either because critical evidence against him was ruled inadmissible, or because the jury failed to agree or found a reasonable doubt as to his guilt, the grounds on which he was imprisoned before trial ordinarily remain unchanged. There may still be a "substantial probability" that he committed the offense charged,

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a person or his premises instituted in connection with a lawful stop, arrest or other seizure must not go beyond the intrusion necessary to effectuate the purposes of the seizure that justified its initiation. *See* Chimel v. California, 395 U.S. 752, 762-68 (1969); Terry v. Ohio, 392 U.S. 1, 20-21, 23, 25, 26, 29 (1968); Sibron v. New York, 392 U.S. 40, 65-66 (1968).

[164] Compare the Supreme Court's unanimous conclusion that a man's status as a convicted state prisoner cannot constitutionally trigger civil commitment for dangerousness without the safeguards provided by statute for all other persons civilly committed in the same state. Baxstrom v. Herold, 383 U.S. 107 (1966) (denial of equal protection).

[165] See notes 25-31 *supra* and accompanying text.

[166] See text at note 94 *supra*.

and whatever reasons previously existed for thinking him likely to commit a further crime are as valid after trial as before. Yet such a defendant will be released under the Administration's proposal, as of course he must be,[187] because criminal charges are no longer pending against him. A system so organized simply makes no sense. The only bases for detention that can rationally be said to arise with a criminal charge and vanish with an acquittal are those directly related to the demands of judicial administration—a risk of flight, witness or jury intimidation, evidence destruction, or other interference with trial.[188]

There may be other valid reasons for preventive detention, such as convincing evidence that an individual is uncontrollably dangerous, or repeated attempts or threats to perform specific criminal acts. But the uncontrollably dangerous are by hypothesis undeterrable and should not be tried as criminals, whereas those who threaten specific crimes, either verbally or by repeated efforts, present a separate problem unrelated to the pendency of a criminal charge and not requiring the creation of sweeping governmental authority to detain for generalized dangerousness. Persons awaiting trial should not be immune to whatever lawful procedures may be devised to deal with individuals who clearly threaten specific crimes;[189] but to carve out a special form of imprisonment applicable only to the criminally accused and yet not demanded by the needs of holding a trial is to give the state a wholly unwarranted power over those it chooses to charge with crime, a power that the eighth amendment should be held to forbid.

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[187] There is no federal statutory power to commit as potentially dangerous a sane defendant acquitted of the charge against him. *See In re* Williams, 157 F. Supp. 871, 876 (D.D.C.), *aff'd per curiam*, 252 F.2d 629 (D.C. Cir. 1958). Although one court has held that it would be unconstitutional to require a peace bond of an acquitted defendant, Commonwealth v. Franklin, 172 Pa. Super. 152, 182, 92 A.2d 272, 287 (1952), there is no obvious reason why a device for preventing individuals from carrying out specific criminal threats could not constitutionally be applied to an acquitted defendant if it were deemed constitutional in other contexts.

[188] That all these risks may justify detention notwithstanding the eighth amendment is not open to serious doubt. *See, e.g.*, Fernandez v. United States, 81 S. Ct. 642, 644-45 (Harlan, Circuit Justice, 1961); United States v. Bentvena, 288 F.2d 442, 444 (2d Cir 1961); United States v. Rice, 192 F. 720 (S.D.N.Y. 1911).

[189] When Mr. Justice Jackson, sitting as Circuit Justice, refused to imprison defendants "to protect society from predicted but unconsummated offenses" pending appeal of their conspiracy convictions under the Smith Act, he took care to note that such devices as peace bonds, see text at notes 136-37 *supra*, remain available as "ways of dealing with certain threats to commit crime." Williamson v. United States, 184 F.2d 280, 282 & n.7 (2d Cir. 1950).

## CONCLUSION

The proposed bill violates the basic principle that an accusation of crime should not subject any man to imprisonment unless the government's need to prosecute him compels incarceration. The bill creates a regime in which no man can be assured that his conduct, however lawful, will protect him from the stigma of imprisonment as a probable criminal. Perplexed by the accusations this bill authorizes, a suspect can never fully prove them false. And whenever the sequel to a successful plea is a further crime, the pressure to expand the system mounts. At every stage of its growth, its calculated sacrifice of innocent defendants would be intolerable even if it could promise a significant reduction in crime. The great irony is that Attorney General Mitchell, "the enlightened compromiser in a pluralistic society,"[100] has offered us not even that. He has offered us instead a pound of detention—for an ounce of cure.

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[100] Mitchell, *Wiretapping and Pretrial Detention—Balancing the Rights of the Individual with the Rights of Society*, 53 J. AM. JUD. SOC'Y 188 (1969).

THE
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# CONSTITUTIONALITY OF PRETRIAL DETENTION

By Hermine Herta Meyer

1789

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THE GEORGETOWN LAW JOURNAL

## CONSTITUTIONALITY OF PRETRIAL DETENTION

By Hermine Herta Meyer

## CORRECTIONS

| Page | |
|---|---|
| 1142 | First paragraph line 4. . .<br>change "deceptive" to "undeceptive" |
| 1150 | Footnote 61, first line. . .<br>change "has" to "had" |
| 1151 | First paragraph line 3. . .<br>should read. . ."based on an official inquisition and an indictment by. . . |
| 1151 | Footnote 69 line 2. . .<br>change "EXCHEQUER" TO "THE EXCHEQUER" |
| 1153 | Last line of page is not end of paragraph |
| | Footnote 79 line 1. . .<br>should read "79 W. GLANVILLE, DE LEGIBUS CONSUITUDINIBUS REGNI. . . |
| 1154 | First paragraph, first line starts with "As seen above, . . . |
| | Footnote 80, line 5. . .<br>"DE LEGUBUS" should read "DE LEGIBUS" |
| 1155 | First paragraph line 3. . .<br>"custom" should read "customs" |

| Page | |
|---|---|
| 1162 | Line 8. . .<br>should read "violent; or indecent conduct with or towards a person under 16;" |
| 1161 | Footnote 227 should read. . .<br>"1 W. & M., Session 2, c.2 (1689) |
| 1183 | Last paragraph, line 2. . .<br>change "remained" to "reminded" |
| 1185 | Footnote 254 should read. . .<br>1 W. & M., s.2, c.2 (1689) |
| 1186 | Paragraph 3, line 9. . .<br>"cambre des estoilles" should read "chambre des estoilles" |
| 1190 | Paragraph 2, line 1. . .<br>First line should read "The Constitutions of the Original States and Their Proposed Amendments". . . |
| | Footnote 285 should read<br>"1 W. & M., s.2, c. 2 (1689) |
| 1194 | Paragraph 1, line 9. . .<br>"deprive courts" should read "deprive its courts" |

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# CONSTITUTIONALITY OF PRETRIAL DETENTION

HERMINE HERTA MEYER[*]

*In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Congress enacted provisions which permit pretrial detention of persons whose release on bail would constitute a danger to the community. Pretrial detention has been attacked by many critics who claim to recognize a constitutional right to bail. In the first part of a two-part article, Dr. Meyer traces the historical origins of the concept of bail and shows how bail became a part of the Anglo-Saxon legal process. She discusses the development of bail in English law and its subsequent introduction into American law during the colonial period. The first part of the article concludes with an examination of the constitutional questions involved in pretrial detention. Considered in this issue is the eighth amendment. Part two of this article will appear in the next issue of the* Georgetown Law Journal *and will discuss the role of the fifth and fourteenth amendments upon this question.*

## INTRODUCTION

Among the most publicized provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970 are those which permit courts to detain certain categories of defendants without bail up to 60 days prior to trial on the ground that their release may constitute a danger to the community.[1] These provisions have given rise to a great deal of controversy. Some people have attacked them as unconstitutional,[2] as representing a sharp break with our legal tradition,[3] and as historically wrong.[4] Others disagreed. They could see no constitutional violation in the new provisions because on the federal level the right to bail has always been a statutory right.[5]

However, discussions in the news media and among legal authors have made it obvious that many people regard the "right to bail" of criminal defendants in noncapital cases as one of the great attributes of individual liberty worthy of constitutional protection.[6] Evidently, the reason that such a concept of bail could take hold lies in the fact that for many centuries in England—from 1166 to 1898—and in the United States until 1966,[7] bail was the only way for a person arrested for a crime to obtain freedom between arrest and trial. No doubt, to those who could afford to pay the price, the possibility of buying their way out of jail appeared as a precious freedom right. But it is strange that those concerned with individual liberties took so long to see the inherent unfairness of a system that makes pretrial release dependent upon payment of money. To those unable to pay, the much vaunted right to bail must have appeared a cruel joke. When finally attention was focused on this problem, several studies revealed that a considerable number of persons, many of them accused of only minor offenses, had been subjected to pretrial detention, often of long duration and with no procedural safeguards, for no reason other than inability to pay.[8]

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[*] Attorney, Office of the Deputy Attorney General, U.S. Department of Justice. Formerly Legal Adviser to the Embassy of Switzerland. Member of the Bar of New York, of the District of Columbia and of the United States Supreme Court. LL.B., New York University. Dr.jur. (doctor utriusque juris) University of Zurich, Switzerland. The views expressed in this article are those of the author and do not necessarily reflect the position of the Department of Justice.

[1] D.C. CODE ANN. §§ 23-1322 to 24 (Supp. IV, 1971).

[2] *See Hearings on Preventive Detention Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 5-7 (1970) [hereinafter cited as *1970 Preventive Detention Hearings*].

[3] *See id.* at 1; Tribe, *An Ounce of Detention, Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 377-80 (1970).

[4] "Preventive danger of a released defendant has never been a part of the rationale of bail." *1970 Preventive Detention Hearings* 26 (testimony of Representative Mikva).

[5] *See* ADMINISTRATIVE BD. OF THE JUDICIAL CONFERENCE OF THE STATE OF N.Y., THE CASE OF THE DANGEROUS DEFENDANT 124, 150 (1969); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969).

The Bail Reform Act of 1966[9] took the first step away from the bail system by authorizing pretrail release on personal recognizance of persons charged with a noncapital offense. Financial conditions were to be imposed only when necessary to assure the defendant's presence at the trial.[10] It then appeared that this Act brought to the fore a problem which had existed all along. Before its passage, judges all over the country customarily detained dangerous defendants charged with serious but noncapital crimes by the imposition of high money bail. After the enactment of the Bail Reform Act of 1966, federal judges who had to pass on applications for release on bail by obviously dangerous defendants were faced with a difficult choice—they either had to disregard the clear mandate of the new law by setting bail beyond the defendant's means or shut their eyes to community danger.[11]

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[6] *See* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 965-99 (1965).

[7] *See* Bail Reform Act of 1966, § 3(a), 18 U.S.C. §§ 3146-52 (1970).

[8] *See* D. FREED & P. WALD, BAIL IN THE UNITED STATES, 1964. *See also* Carnley v. Cochran, 369 U.S. 506, 521 (1962) (defendant was confined for a lengthy period prior to trial, five months of which were alleged to have been spent in solitary confinement); Smith (Raymond) v. United States, 118 U.S. App. D.C. 38, 47, 331 F.2d 784, 793 (1964) (defendant was confined almost six months awaiting trial).

In 1970, 83,079 persons in American prisons had not been convicted, but were being held in pretrial detention or otherwise. The total inmate population of American prisons as of March 15, 1970 was 160,863. Of the 83,079 who had not been convicted, 55,619 were arraigned and awaiting trial, and 27,460 were being held for other authorities or had not yet been arraigned. Since those not arraigned had not been formally charged, they were not eligible for bail. The above figures are the result of a study which was limited to jails which have the power to hold persons for more than 48 hours. U.S. DEP'T OF JUSTICE, LEAA, 1970 NATIONAL JAIL CENSUS 1 (1971); *see* Workman v. Cardwell, 11 CRIM. L. REP. 2027, 2028 (N.D. Ohio, Mar. 7, 1972) (defendant in jail 359 days prior to conviction and sentence).

[9] 18 U.S.C. §§ 3041, 3141-43, 3146-52, 3568 (1970).

[10] *Id.* §§ 3146-52.

In *United States v. Melville*,[12] Judge Frankel of the United States District Court for the Southern District of New York described a situation in which bail of from $100,000 to $300,000 had been imposed as a "wholly deceptive fiction, meaning to everyone 'no bail' " because the defendants would not be able to meet the "astronomical" amount.[13] The *Melville* case is instructive because it involved state[14] and federal[15] judges facing a patently dangerous defendant on the same issue while operating under different bail statutes. The case is worth mentioning here, because it demonstrates that, contrary to the assertions of the critics of the new Act a judge in most cases will have little difficulty in recognizing the dangerousness of a defendant, and that there is need for legislation to permit a judge to face the problem honestly and directly without the subterfuge of high money bail.

The facts, as described in the various decisions in the case, were substantially as follows. Between July 26, 1969 and November 12, 1969, high explosive devices equipped with timing mechanisms were detonated in a number of occupied buildings in New York City. Nineteen persons were injured. Only the steel partitions of the buildings had prevented these injuries from being fatal. On November 13, 1969, Melville was arrested on federal property carrying two dynamite bombs, each equipped with a timing device and blasting cap, a fully loaded .38 caliber pistol, and a tear gas "pen." Melville had also been involved in a theft of 150 pounds of dynamite. At the time of his arrest, the greater portion of these explosives was still unaccounted for. Melville was described not only as the engineer who made and planted the bombs, but also as the sole co-conspirator capable of such action.[16] It was also revealed that he had claimed that he had contacts with fugitive Canadian terrorist bombers for whom he had arranged transportation to Cuba.

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[11] *See* H.R. REP. No. 907, 91st Cong., 2d Sess. 83-84 (1970).

[12] 306 F. Supp. 124 (S.D.N.Y. 1969).

[13]
> They [the defendants] are to be freed the commissioner has held, upon the posting of bail bonds of from $100,000 to $300,000, the new amounts proposed by the United States Attorney on November 14 in lieu of the $500,000 across the board proposed by him and accepted by the commissioner the day before. But it is apparent that in this instance, as in many others familiar to all of us, the statement of the astronomical numbers is not meant to be literally significant. It is a mildly cynical but wholly undeceptive fiction, meaning to every one "no bail." There is, on the evidence adduced, no possibility that any of these defendants will achieve release by posting bond in anything like the amount which has been set.

*Id.* at 127.

[14] People v. Melville, 62 Misc. 2d 366, 308 N.Y.S.2d 671 (Crim. Ct. 1970); *see* N.Y. CODE CRIM. PRO. § 553 (McKinney Supp. 1971).

[15] United States v. Melville, 309 F. Supp. 829 (S.D.N.Y. 1970); United States v. Melville, 309 F. Supp. 824 (S.D.N.Y. 1970); United States v. Melville, 309 F. Supp. 822 (S.D.N.Y. 1970); United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969); *see* 18 U.S.C. §§ 3146-52 (1970).

In the federal case, Melville and others were first charged with, and later indicted for, conspiracy to explode bombs in a number of federal buildings in New York City. The case came before Judge Frankel on appeal from the above mentioned high money bail determination of the United States Commissioner.[17] Judge Frankel found the objectives of the alleged conspiracy "terrifying" and the charge "grave and alarming." [18] But he stated that existing law provided no authority to confine defendants in noncapital cases before trial on the ground that they are likely to commit other crimes, and that under the Bail Reform Act of 1966, the task of setting conditions for release consists exclusively of ascertaining the least onerous conditions "which will reasonably assure the appearance of the person for trial. . . ." [19] He concluded that the circumstances of the case did not justify a practical denial of bail; he therefore reduced the bail to $50,000 for Melville and to $25,000 and $20,000 for the co-conspirators. As additional conditions the defendants were ordered to report daily to the United States Attorney and to remain in New York County.[20]

When later the full facts were discovered, Judge Pollack of the same court increased bail on Melville to $100,000, and a superseding indictment of 23 counts charged that Melville bombed and was about to engage in bombing various federal properties. In addition to the money bail, Melville was required to remain in custody daily from six p.m. until nine a.m., his travel was restricted to Manhattan, and he was prohibited from entering railway stations, airports or similar facilities leading out of the area.[21]

In his decision increasing bail, Judge Pollack stated that "[t]he law plainly is that before a conviction, a person arrested for a noncapital offense shall be admitted to bail." [22] But he pointed out that under the authority of *United States v. Nebbia*,[23] the court could refuse to approve a bond if it lacked confidence in the surety's purpose or ability to secure the appearance of a bailed defendant, even though the financial standing of the surety was beyond question.[24] The record indicated that one of the financial sponsors of defendant's bail had described the defendant Melville as a dedicated revolutionary brother who should be freed at any cost.[25] "Such an attitude," said Judge Pollack, "is scarcely consonant with the responsibility which the law imposes." [26] Subsequently, Melville proffered a corporate surety appearance bond to be issued in the face amount of $100,000 by a company on the list of accredited companies on file with the clerk of the court. However, Judge Pollack refused to accept the bond without full disclosure of all the facts regarding the sources of the bail, including those to whom the corporate surety looked to secure its agreement to issue the bond.[27]

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[16] 62 Misc. 2d at 371, 308 N.Y.S.2d at 675.

[17] *See* note 13 *supra* and accompanying text.

[18] 306 F. Supp. at 125.

[19] 18 U.S.C. § 3146 (a) (1970).

[20] 306 F. Supp. at 129.

[21] 309 F. Supp. at 826.

[22] 309 F. Supp. at 823.

[23] 357 F.2d 303, 304 (2d Cir. 1966).

[24] 309 F. Supp. at 823-24.

In the state case, Melville was charged with the bombing of six occupied buildings and possession of two dynamite bombs and a fully loaded .38 caliber pistol. The defendant applied for bail. He claimed to be prepared to post the $100,000 bail on the federal indictment, and he asked that he be released by the New York court on his own recognizance or on a nominal bail.[28] The District Attorney of New York County asked that no bail be set because of the danger of flight and because, if released, the defendant might strike again. He believed that Judge Pollack's findings of fact clearly suggested that the United States District Court would have denied bail in the exercise of sound discretion if it had possessed the statutory authority.[29]

In a decision on March 10, 1970, the state court held that New York law leaves bail to the discretion of the court in all felony cases.[30] Judge Lang exercised his discretion by denying bail for two reasons. First, there was danger of flight because neither the defendant nor his family or close personal friends would suffer any financial loss if he jumped bail, he faced extremely serious punishment, and he admittedly had connections with other countries. Second, his release would cause potential danger to the community, a consideration of even greater concern to the court.[31] Judge Lang could find no indication that the defendant's conduct would be more socially responsible if he were released on bail. He added that a large amount of dynamite from the theft attributed to the defendant was still missing. Therefore, he ordered the defendant held without bail with leave to renew his application if the prosecuting agency was not prepared to afford him a speedy trial. As the New York prosecutor remarked,[32] very likely the federal judge also would have denied bail on the ground of danger to the community had the Bail Reform Act of 1966, under which he operated, permitted him to do so. But unlike the New York judge, he could not face the situation directly, but had to make the release conditions as arduous as possible.

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[25] *Id.* at 824.

[26] *Id.*

[27] 309 F. Supp. at 829.

[28] 62 Misc. 2d at 368, 308 N.Y.S.2d at 673-74.

[29] *Id.* at 370, 308 N.Y.S.2d at 675.

[30] *Id.; see* N.Y. Code Crim. Pro. § 553 (McKinney Supp. 1971).

[31] 62 Misc. 2d at 375, 308 N.Y.S.2d at 680.

[32] *Id.* at 370, 608 N.Y.S.2d at 675.

One of Congress' stated objectives in enacting the new pretrial detention provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970[33] was "to eliminate from the bail system the hypocrisy of locking up defendants, without fixed standards, through the device of requiring a high money bond." [34] Thereby Congress took a second step away from the mechanical application of the bail system and its inherent unfairness toward people without means. Congress limited its applicability to the District of Columbia, because there the release of dangerous defendants prior to trial has had its greatest impact, for only in the Nation's capital does the federal government prosecute the full range of common law street crimes such as rape, robbery, and burglary.[35]

Because of the doubts expressed by many persons concerning the constitutionality of the new Act and the claims that the right to bail is a constitutionally protected right of individual liberty, this study will examine the justification of these claims in the light of history, statutory law, and court decisions. Finally, as a comparison, the solutions found by several democracies of the European Continent will be considered.

## HISTORICAL DEVELOPMENT OF BAIL IN ANGLO-AMERICAN COURT PROCEEDINGS

Early English law distinguished between bail[36] and *mainprise*.[37] The difference between the two seems to have been that, in the case of bail the person in the custody of one was handed over to the custody of another who had given bail for him and who thereby became liable for the prisoner's obligation with his own property and person, while in the case of *mainprise* the debtor was not in the custody of the *mainpernor*, who was only surety for the debtor's appearance.[38] However, these distinctions later disappeared.[39] The essential factor in each situation remained the assumption of responsibility by one person for the obligation of another.

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[33] D.C. CODE ANN. §§ 23-1321 to 32 (Supp. IV, 1971).

[34] H.R. REP. No. 907, 91st Cong., 2d Sess. 82, 87-89 (1970).

[35] *Id.* at 89.

[36] Derived from the French word *bailler*, meaning to hand over, to lease.

[37] Derived from the French words, *main*, hand, and *pris(e)*, taken.

[38] *See* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 105-06 (3d ed. 1923) [hereinafter cited as HOLDSWORTH].

[39] 9 HOLDSWORTH 525-26; 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 589-90 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND].

### BAIL IN ANGLO-SAXON LAW

Legal historians believe that the earliest Anglo-Saxon form of bail for a person accused of wrongdoing can be found in the pledges for the payment of the *wergeld*.[40] The slaying or wounding of a man originally led to a blood feud between the families or clans of the victim and those of the man who inflicted the wounds. Early, the families attempted to replace this by a monetary compensation, the *wergeld*. Since the sums involved were considerable and could rarely be paid at once, the offender, through his family, offered sureties, or *wereborh*, for the payment of the *wergeld*. If accepted, the injured party met with the offender and his surety. The offender gave a *wadia*. a *wed*, such as a stick, as a symbol or pledging or an indication of the assumption of responsibility. The creditor then gave it to the surety, indicating that he recognized the surety as the trustee for the debt. He thereby relinquished his right to use force against the debtor. The debtor's pledge constituted a pledging of person and property. Instead of finding himself in the hands of the creditor, the debtor found himself, up to the date when payment fell due, in the hands of the surety.[41] Detailed tariffs, varying with the rank of the injured party, prescribed the compensation payable for different offenses.[42] Very early the King or other person in authority, or the community where the wrong had occurred also had to be paid compensation, because they were considered to be injured by a wrong done to a person under their protection.[43] Gradually, the rulers attempted to end feuds and replace them with judicial process, although first on a completely voluntary basis.[44]

The Anglo-Saxons had an elaborate surety system, designed primarily to facilitate the control of a central authority (King or lord) by making a communal or individual surety responsible for the lawful behavior and fulfillment of the legal obligations of each man.[45] It seems, however, that the general surety arrangements of that period were not used in connection with court proceedings, and that the bail surety therefor was always an individual or a group of individuals selected for that particular purpose.[46]

In order to understand the role of bail in early court proceedings and its subsequent development, a brief description of the essential features of those proceedings is desirable. Since it will be necessary to refer to them later in the discussion of due process and the presumption of innocence, they are described here in more detail than might be necessary merely for the consideration of bail.

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[40] E. DE HAAS, ANTIQUITIES OF BAIL 3 (1940) [hereinafter cited as DE HAAS].

[41] DE HAAS 3, 12-14.

[42] 2 HOLDSWORTH 44-45.

[43] *Id.* at 47.

[44] *Id.* at 43-45; DE HAAS 14-15.

[45] *See* DE HAAS 16-24.

[46] *Id.* at 23.

### GERMANIC COURT PROCEEDINGS

*The Formalistic Process.* The judicial proceedings of the Anglo-Saxons were essentially the same as those of the formalistic process of the other Germanic tribes, with certain variations. They were accusatorial proceedings of the purest kind, that is there had to be a private accuser who undertook the institution and prosecution of the action. If no accuser appeared, there could be no case. Crimes were regarded as an injury to the individual rather than to the peace of the community.[47] The accuser, therefore, could only be the injured party or, if he was dead, his family. The accuser had to bring his adversary before the court.[48] He did this through the use of a summons.

The accused was permitted certain recognized excuses, *essoins*, for nonappearance. In Anglo-Saxon times, these were absence beyond the seas, service of King or lord, sickness, or tempest. If the accused neither appeared nor produced a valid *essoin*, he was fined. The summons was repeated three times. Successive failure to appear entailed fines increasing in amount which could be levied by distress.[49] If the accused did not appear, the accuser might proceed to realize his claim or, in serious criminal cases, the accused might even be outlawed.[50] There were then already certain pressures available to the accuser to make the accused appear in court. Once in court, the accuser would speak his accusation in solemn form, which the accused had to answer word for word in equally solemn form.[51]

Judgment was rendered upon the pleadings and came before the proof. The judgment was in an alternative form. It decided in advance who had to prove and how, and what the consequences were to be in case of success or failure. It was followed by the *wager*. The party to whom proof was awarded gave *gage* or pledge by way of security that he would make his law, that is, that he would go to the proof as required by the judgment.[52]

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[47] *See id.* at 53 n.12, 57; *cf.* 1 J. GOEBEL, FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF ENGLISH CRIMINAL PROCEDURE 338 (1937).

[48] H. BRUNNER, DIE ENTSTEHUNG DER SCHWURGERICHTE 44 (1872) (The Origin of the Jury) [hereinafter cited as BRUNNER, SCHW.]; 2 HOLDSWORTH 103.

[49] The accuser obtained leave of the court to take things from his adversary and keep them. *See* 2 POLLOCK & MAITLAND 575.

[50] 2 HOLDSWORTH 103-05.

[51] BRUNNER, SCHW. 44.

[52] 2 H. BRUNNER, DEUTSCHE RECHTSGESCHICHTE 493 (2d ed. vol. 1, 1906, vol. 2, 1928)

Proof was not made to the judges to convince them of the truth of the alleged facts, as was done in Roman procedure. In Germanic procedure proof took place out of court. It was made to the adversary with a view to the convictions and beliefs of the entire community.[53] Only one party could prove. In criminal cases this was always the defendant. Proof was made by oath with oath-helpers, or by ordeal. In Norman times the oath could be challenged by combat.

Proof had nothing to do with fact finding. All modes of proof were of sacred origin, based on a belief of divine intervention in human life. Thus by "going to the proof" the litigant placed his case directly into the hands of the gods. He did not have to accept conviction by men, that is by witnesses. The defendant's right to reject proof by witnesses continued for many centuries[54] and was the reason for the slow acceptance of proof by jury in criminal proceedings.[55]

However, the Germanic laws did recognize witnesses in civil proceedings.[56] But a person could not be a witness merely because he had accidentally gained knowledge of certain facts. The only persons who might act as witnesses in court were 1) attesting witnesses–persons who had been requested by a party to witness a certain transaction in order to be able to testify subsequently to the event,[57] and 2) community witnesses–persons who by reason of particular circumstances such as their relationship to the party as kinsmen, neighbors, or members of the same community, were presumed to have knowledge of a situation of long standing. The witnesses were strictly party witnesses. They swore either in favor of the party who brought them into court or not at all.[58] Their oath was in an assertory form. It asserted the proof formula contained in the judgment. Proof was the oath itself, not what was said before.

If the accused was caught in the act of committing a crime or after pursuit "with the hue and cry," his deed was so open and notorious

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(German Legal History) [hereinafter cited as BRUNNER, DRG]; 2 HOLDSWORTH 106; 2 POLLOCK & MAITLAND 602.

[53] BRUNNER, SCHW. 48.

[54] "Proof" in accordance with the folk laws was *lex terrae*, the law of the land, and a free man had a right to have his law, his *lex*, if accused of a crime, a matter especially insisted upon by the barons in chapter 39 of the Magna Charta. *See* 28 Edw. 3, c. 3 (1354).

[55] 9 HOLDSWORTH 178-79.

[56] *See* BRUNNER, SCHW. 49; THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 44 (1898) [hereinafter cited as THAYER].

[57] Still in existence in Anglo-American procedure as testamentary witnesses. *See* 4 J. WIGMORE, WIGMORE ON EVIDENCE §§ 1287-1321 (3d ed. 1940).

[58] A remnant thereof is still recognizable in Anglo-American procedure in the rule that a party cannot impeach his own witness. *See* 3A J. WIGMORE, WIGMORE ON EVIDENCE §§ 896-918 (Chadbourn rev. ed. 1970).

that no accusation was necessary and he had no right to proof. By his misdeed he had made himself *friedlos*, a person without peace who could be killed by his captors without accusation and without the right to answer and to have his law, that is to clear himself by the recognized formalistic proof proceedings. The captor would clear himself from the suspicion of any crime by swearing an oath with oath-helpers who, in the early period, were probably neighbors who had run to the scene upon the captor's hue and cry.[59] In time the right to kill was replaced by the right to capture and bind the culprit and bring him before the court for summary justice. Capture in the act was the only situation in which a free man could be arrested,[60] and it was the only case in which he could be convicted without an accuser and a formal accusation. Most rules which developed in later centuries to permit arrest and ex officio proceedings, that is proceedings by an authority without a private accuser, were based on extensions of capture in the act.

*The Jury.* The Germanic system could suffice in close communities where everyone was known and deep religious convictions would prevent a guilty man from "going to the proof." But expanding trade and increased contacts with the outside world created a need for more rational methods of proof. This need was first supplied by the *inquisitio*, which was the original name of the jury. It was the first inquisitorial feature to enter into the purely accusatorial Germanic process. It stands at the inception of the inquisitorial process and has given it its name.

The *inquisitio*, or jury, entered into history in the eighth century in the courts of the Frankish Kings. It was first used predominantly in proceedings by and against the *fiscus*—the treasury—concerning property rights of the Crown, or in cases where permission to prove by *inquisitio* had been specially obtained from the King. Thus when in regular accusatorial proceedings the parties had arrived at an issue of fact, the judge ordered an official investigation for the purpose of ascertaining those facts. Thereupon the judge or a high official with special authority from the King summoned the most respected members of the community in which the cause of the controversy arose and who therefore would have knowledge of the facts in question, and requested them to swear that they would give a truthful answer—*veredictum*—to the questions he was going to ask. Their promise was followed by the questions formulated by the judge. This has given the whole procedure its name, namely *inquisitio*, that is, inquest.

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[59] 2 Brunner, DRG 482; 2 Pollock & Maitland 578-79.

[60] Brunner, Schw. 44.

The jurors' oath was a promissory oath like the Roman witness oath.[61] Proof by *inquisitio* was not the oath, but the juror's truthful answer to the questions of the judge, the *veredictum*, the verdict.[62] Therefore, the questioning followed the juror's promise to speak the truth. The answer was given after they had sworn the oath; therefore they were *jurati*, sworn persons,[63] when they made proof, as distinguished from the Germanic witnesses whose proof was the oath itself which was sworn at the end of the proceedings. Proof by jury was two-sided, not one-sided like that of the Germanic witnesses;[64] the verdict could be in favor of the plaintiff or the defendant. The party's right or duty to prove had become irrelevant. Proof was in fact, taken out of the hands of the parties and furnished by an ex officio investigation. The state had assumed the right and duty to prove.[65] The jurors were the witnesses of the King.

For many centuries, proof by jury could not be used in criminal proceedings because of the Germanic prohibition of conviction by witnesses. In this situation, the King used the *inquisitio* to extend his right to prosecute ex officio, that is on his own initiative without a formal accusation by a private accuser. The procedure was the same as in the case of proof by jury. The King would order an *inquisitio* for the purpose of finding out whether certain crimes had been committed and who had committed them. If as a result of such inquiry the jurors named a suspect, he was called *indictatus*, which means a person publicly denounced. By the indictment, the crime had become notorious, known to all, and the *indictatus* could be forced to clear himself through the ordinary forms of proof, namely oath or ordeal. However, the jury as an actual instrument of proof did not appear in criminal procedure until the late 12th century. It began to assume importance after the Church abolished the ordeals in 1215.

In light of this description of the old Germanic procedure, it is not difficult to understand why a right to release on bail of arrested persons, as it is understood today, was not known to the Anglo-Saxon procedure. As already mentioned, Anglo-Saxon procedure was essentially the same as the formalistic process of the other Germanic tribes. A free man could only be arrested when captured in the act of committing a crime or after pursuit with the hue and cry. But in that case there could be no release. In other cases the procedure began with a summons and not with an arrest, and the free defendant gave pledge with surety to assure the accuser that he would go to the proof and fulfill the judgment if he failed. It was advisable for a defendant to have property or friends. If he had neither, he could lose his freedom.[66] The significance of this appears in the oppressive nature of the surety's obligations. If the defendant escaped or avoided going to the proof, the surety had to pay the *wergeld* either to the King or the lord entitled to the fines and to make restitution or indemnification to the injured party. The *wergeld*, which originally constituted peace money, had changed into a fine.[67]

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[61] This was a novelty in Germanic laws where the oath always has been an assertory oath. For this reason it has been suspected that the roots of the jury lay somewhere in Roman law, but the beginnings of the institution have remained in darkness. 2 BRUNNER, DRG 639.

[62] BRUNNER, SCHW. 85-86.

[63] The name *juratores* appeared in the ninth century in the synodal courts of the Church. *See* REGINO, LIBRI DUO DE SYNODALIBUS CAUSIS ET DISCIPLINIS ECCLESIASTICIS, DE JURATORIBUS SYNODI, c. 1-5. Regino died in 915.

[64] BRUNNER, SCHW. 69; THAYER 17.

[65] As will be shown later in connection with the presumption of innocence, this is one of the reasons why a doctrine of burden of proof could not develop in Anglo-Saxon or early English procedure.

## ARREST AND BAIL IN ENGLAND FROM THE ANGLO-NORMAN PERIOD TO THE CRIMINAL JUSTICE ACT, 1967

The relationship between arrest and release on bail began to appear in England with the arrival of prosecution ex officio, that is a prosecution instituted by the King without a private accuser, based on official inquisition and indictment by the jury.[68] In 912, the Normans had conquered the Frankish province of Neustria and had quickly absorbed the language, laws, and institutions of the Franks. When they conquered England in 1066, the Normans brought with them three institutions of Frankish origin through which they soon established a strong centralized system of justice. These institutions were 1) the jury; 2) the *curia regis*, or King's court—a strong centralized court modeled after the Norman *curia ducis* which in turn was modeled after the West-Frankish *curia regis*[69] and which combined the highest judicial, legislative, and administrative functions; and 3) the royal *missi*, who were personal representatives of the King to carry the King's court into all parts of the country. Immediately after the conquest, the conqueror sent his *missi* to all parts of the land to conduct inquests among the neighbors for the purpose of securing data concerning possession, tenure, and taxable capacity of the land holders. Other inquisitions followed in close succession. Soon the jury inquests became a part of the system of government and royal justice.[70]

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[66] *See* Heinze, *Zur Geschichte der Sicherstellung im germanischen Strafverfahren*, 10 *Zeitschrift fur Rechtsgeschichte* 450, 454 (Savigny Stiftung 1872); 2 BRUNNER, DRG 442.

[67] DE HAAS 23. A law in the time of Edgar (946-961) qualified this obligation by permitting a refund of money paid by the surety of a thief, if the surety could capture the thief within 12 months. *Id.* at 23 n.125.

[68] *See* Y.B. Horwood 30 & 31 Edw. 1, at 529-30 (1303) (where the term ex officio is used exactly in that way).

[69] BRUNNER, SCHW. 147-48; C. HASKINS, NORMAN INSTITUTIONS 33 (1918); T. MADOX, THE HISTORY AND ANTIQUITIES OF EXCHEQUER 2 (1769) [hereinafter cited as MADOX]. *See generally* 1 HOLDSWORTH 33.

The *inquisitio* for the detection of crime was used by the Norman Kings very probably soon after their arrival in England.[71] It was, however, Henry II, King of England from 1154-1189, who built the institution of the *missi* and inquisitions into a centralized system of law administration. Within a few years of Henry II's accession to the throne he organized the *missi* into the institution of the itinerant and visiting judges. In 1176 he divided the country into six parts and appointed for each division three itinerant judges. They were specially instructed to carry out a number of *assizes* providing for jury inquisitions.[72]

The first enactment in which the relationship between ex officio proceedings and arrest and release on bail clearly appears is the Assize of Clarendon (1166).[73] It directed in section one:

> In the first place, the aforesaid King Henry, with the advice of all of his barons has enacted that for the preservation of the peace and the maintenance of justice inquiries should be made [*inquiratur*] in each county and in each hundred through twelve of the more legal men of the hundred and through four of the more legal men of each township upon their oath that they will tell the truth [*verum dicent*]: whether there is in their hundred or in their township any man who has been accused or publicly suspected [*sit rettatus vel publicatus*] of being a robber or murderer or thief or of being a receiver of robbers or murderers or thieves, since the lord King has been King. And let the justices make the inquiries before themselves, and the sheriffs [*vicecomites*] before themselves.[74]

Section two ordered that anyone who, by the oath of the jurors, was accused or publicly suspected of the aforementioned crimes, should be arrested, go to the ordeal of water, and swear that he had not been a robber or murderer or thief or a receiver of these, as far as he knew. Section three gave the lord of the arrested man or the lord's steward a right to offer surety within three days after the arrest in order to obtain the prisoner's release "until he makes his law," which was upon the arrival of the itinerant justices. Section five provided that the King's court was to have exclusive jurisdiction over persons arrested upon a jury indictment, while all other cases remained subject to the jurisdiction of the local lords. Section fourteen contained special provisions for potentially dangerous persons, those *de pessimo testimonio et publice et turpiter diffamati testimonio multorum et legalium hominum*, namely those of very bad reputation and of infamous and evil report by the testimony of many and of legal men. For such people it was not enough to make their law. If they succeeded in getting safely through the ordeal, they had to abjure the Kingdom and leave it within eight days. If they returned without the King's permission, they could be outlawed.[75]

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[70] 1 HOLDSWORTH 49; MADOX 146; 1 POLLOCK & MAITLAND 143.

[71] BRUNNER, SCHW. 465-66.

[72] MADOX 18, 122, 150.

[73] Assize of Clarendon, *reprinted in* W. STUBBS, SELECT CHARTERS 143 (2d ed. 1874) [hereinafter cited as STUBBS].

[74] Translated from Latin by the author.

The Assize of Northamption (1176) added the crimes of forgery, arson, and treason to the list,[76] and provided that the *indictatus* must go to the ordeal of water. He was no longer permitted to swear any oath. To make justice more rigorous, it was added that if he failed in the ordeal, he was to have one foot and his right hand cut off and he had to abjure the realm and leave the Kingdom within forty days. If he succeeded in the ordeal, this was no longer proof of his innocence.[77] He could remain in the Kingdom, but he had to find pledge unless he was indicted for murder or another infamous crime, in which case, even if he remained unharmed by the ordeal of water, he nevertheless was to abjure and leave the Kingdom within forty days.

Through the Assizes of Clarendon and Northampton, Henry II established ex officio prosecution for all serious crimes and brought them under the exclusive jurisdiction of the *curia regis*. Prosecution based on an official inquisition with jury indictment came to be called the suit of the King, as distinguished from the appeal by private accuser.[78] For a long time, the accusatory procedure of the folk laws continued in the local courts side by side with the inquisitorial jury procedure in the King's Court. Accordingly, Glanville[79] reports two different ways of dealing with bail, depending on whether an accuser appeared or public *fama* alone accuses him.[80]

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[75] STUBBS 143.

[76] Assize of Northampton § 1, *reprinted in* STUBBS 150-51.

[77] Under section 14 of the Assize of Clarendon this applied only to persons of *mala fama*. STUBBS 144-45; *cf.* note 80 *infra*.

[78] 3 Edw. 1, c. 12 (1275); *see* 3 Hen. 7, c. 1, § 11 (1487). *See also* Y.B. Horwood 30 & 31 Edw. 1, at 529-30 (1303).

[79] W. GLANVILLE, DE LEGUBUS CONSUIUTDINIBUS REGNI ANGLIAE, lib. XIV, c. 1-8 (published between 1187 and 1189).

[80] *Id.* at c. 1; *cf.* Assize of Clarendon § 1, *reprinted in* STUBBS 141. Capture in the

But the distinction seems to have disappeared early. As seen above, the Assize of Clarendon provided for the arrest of every person indicted by the inquest.[81] This meant that, in ex officio actions, criminal proceedings began with an arrest based on an inquisition and not with a summons as in accusatory proceedings. The question now arose as to what to do with the prisoners during the long period of time which often elapsed between the arrest and the coming of the itinerant justices. The only statutory provision providing for a right to release on bail was that given in section three of the Assize of Clarendon to the lord of the arrested man, a right quite obviously provided for the reason that the lord would not lose the services of his man in the intervening period. The sheriff was the local representative of the Crown and as such had charge of prisoners. He was personally responsible for their appearance before the justices and could suffer serious consequences if a prisoner escaped.[82] The existing bail system permitted him to shift this responsibility to a pledge by releasing the prisoner to the pledge's custody. The sheriff seemed to have been quite willing to do so, because this was the usual procedure.[83] If the sheriff failed to grant bail, the King's *writ de homine replegiando* could be bought, compelling the sheriff to release the prisoner.[84] This writ was also sought in cases of wrong or unjust imprisonment.[85]

Soon, custom seems to have established two distinct categories of offenses, one bailable under common law, the other one not bailable. Early registers, dated probably 40 years after Glanville's treatise, designate four groups of offenses as nonbailable. These were those arrested by the special command of the King or his Chief Justices, or for the death of a man, or for an offense in the King's forest, or for any other "*retto*" for which according to English custom he is not

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act with the hue and cry was the only case in which a man could be convicted without an accuser, because his crime was notorious. Later, *mala fama* and *publica fama*—evil fame and public report—were used as an extension of the hue and cry to permit official prosecution without an accuser. The jury was the county, the *patria*. Its indictment was *fama patriae*. 2 BRACTON, DE LEGUBUS ET CONSUETUDINIBUS ANGLIAE f. 143, c. XXII, at 450-51 (T. Twiss ed. 1879) [hereinafter cited as BRACTON]. Through the indictment the crime had become notorious which permitted the King to proceed ex officio without an accuser.

[81] *See* notes 73-75 *supra* and accompanying text.

[82] DE HAAS 56-57 & n.23.

[83] *Id.* at 57.

[84] DE HAAS 62-65; 4 HOLDSWORTH 526. De Haas, in her search for the origin of bail, found one of the first records for the purchase of a *writ de homine replegiando* in the Pipe Roll records for 1165-66—the very year in which the Assize of Clarendon was enacted. DE HAAS 62.

[85] DE HAAS 62 n.49, 64.

bailable.[86] The same categories appear in Bracton's treatise.[87] For these offenses bail would be granted after a *writ de manucaptione* had been purchased at the King's Chancery commanding the sheriff or his subordinates to grant bail.[88] In other words, the King could always order that a person be kept without bail or be released since all powers, judicial, legislative, and administrative, resided in him.

However, the sheriff frequently granted bail in the case of crimes declared to be nonbailable without a royal writ, probably because local custom differed.[89] Many complaints about the misuse of power by the sheriff resulted in a number of jury inquisitions. The Inquests of the Hundred of 1274 reported gross abuses by the sheriffs and their subordinates. Bribes were exacted from arrested persons who were bailable. Others, although not bailable, were released to pledges against payment of considerable sums of money, and innocent people were arrested to extort money from them.[90] The poor remained in prison. Thus, it is reported that Ranulfo de Rouceby remained in prison for eight years, until he paid forty shillings to be pledged, although he could have been released on bail from the beginning.[91] The answer to these abuses was the Statute of Westminster I,[92] which was the first statutory regulation of bail. It was a reform statute, addressed to the sheriffs, undersheriffs, constables, and bailiffs and intended to give them definite guidelines in handling release on bail.

The preamble of the statute stated that since before it had not been determined which persons were bailable and which were not, it confirmed as nonbailable those persons "taken for the death of man, or by commandment of the King, or of his justices, of for the forest." Then the statute proceeded to enumerate the types of offenses which were not bailable by the sheriffs and those which were.[93] Prisoners

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[86] *Id.* at 64-65.

[87] BRACTON f. 154, at 536-37.

[88] DE HAAS 69.

[89] *Id.* at 75.

[90] *Id.* at 87-95.

[91] *Id.* at 92.

[92] 3 Edw. 1, c. 15 (1275); *see* DE HAAS 95.

[93] Nonbailable were: (1) such prisoners as before were outlawed; (2) those who have abjured the realm; (3) approvers; (4) such as be taken with the manour (*cum manuopere*); (5) those who had broken the King's prison; (6) thieves openly defamed and known; and (7) such as be appealed (accused) by approvers, so long as the approvers be living, if they be not of good fame; (8) such as be taken for houseburning feloniously done; (9) for false money; or (10) for counterfeiting the King's seal; or (11) persons excommunicated, taken at the request of the Bishop; or (12) for manifest offenses; or (13) for treason touching the King himself.

Bailable were: (1) such as be indicted of larceny by official inquests taken by sheriffs or bailiffs; or (2) of light suspicion; or (3) for petit larceny that amounteth charged with bailable offenses had to be released upon sufficient surety, without any additional payment to the sheriff. He and his subordinates were threatened with loss of office and three years imprisonment, plus a fine at the King's pleasure, if they did not comply with the statute; and if any of them should take any reward for the release of a prisoner, he was to pay double that amount to the prisoner, and be at the mercy of the King.

The statute did not bind the higher justices who remained unrestricted in either securing release of a prisoner through bail or making him nonbailable by special command.[94] Nor could it govern the King himself who continued to be free to command a person's imprisonment or release.[95]

Subsequently, the sheriff's powers of admitting prisoners to bail were to a great extent transferred to justices of the peace by a series of statutes.[96] In 1554, a statute[97] established a procedure of preliminary inquiry by the justices of the peace, intended to guard against collusion between the justices and the prisoners brought before them.[98] The justices were expressly prohibited from bailing any person not bailable under the Statute of Westminster I of 1275. Numerous statutes, relating to particular offenses, were enacted in the 17th and 18th centuries,[99] but the statute of 1275 as to bailable offenses, and the statute of 1554 as to the procedure by which bail could be obtained, remained the basis of the law on this subject until 1826.[100]

At the time of the American Revolution, English bail law consisted of so many particular rules which made a systematic treatment almost impossible, and the wide range of judicial discretion created exceptions

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not above the value of 12 pence, if they were not accused (*rette*) of other larceny aforetime; or (4) accused (*rette*) of receipt of felons; or of commandment, or force, or of aid of felony done; or (5) accused (*rette*) of other trespass, for which a man shall not lose life nor limb; and (6) a man appealed (accused) by an approver after the death of the approver, if he be no openly defamed thief. 3 Edw. 1, c. 15 (1275).

[94] DE HAAS 96; *see* 4 W. BLACKSTONE, COMMENTARIES 299 (W. Lewis ed. 1900) [hereinafter cited as BLACKSTONE] ("the court of King's bench, or any judges thereof in time of vacation, may bail for any crime whatsoever . . . ."); 1 J. CHITTY, PRACTICAL TREATISE ON THE CRIMINAL LAW 98 (2d ed. 1847) ("this power is to be exercised in the discretion of the court and none can claim its benefits de jure."); M. HALE, HISTORY OF THE PLEAS OF THE CROWN 129-34 (1847) [hereinafter cited as HALE]; *cf.* 23 Hen. 6, c. 10 (1444). *See also* 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 243 (1883) [hereinafter cited as STEPHEN].

[95] DE HAAS 96.

[96] 1 STEPHEN 236.

[97] 1 & 2 Phil. & M., c. 13 (1554).

[98] 1 STEPHEN 237-38.

[99] *Id.* at 238.

[100] *See* 7 Geo. 4, c. 64 (1826) (altering provisions and procedure relating to bail); *see* 4 HOLDSWORTH 527-28.

to practically any rule. A glance at the rules set forth by Hawkins[101] shows the complexity of the situation. Blackstone, who built upon Hawkins, tried to simplify this complexity.[102] His account of the English bail situation was as follows: A justice of the peace could not bail prisoners accused of treason; or of murder; or of manslaughter if clearly guilty or indicted; or of prison break if previously committed for a felony; or persons outlawed; those who have abjured the realm; or approvers[103] and persons accused by them; persons taken in the act of a felony; persons charged with arson; excommunicated persons. Other cases were "of a dubious nature" in which a justice of the peace seemed to have had discretion to bail or not to bail. They were thieves openly defamed and known; persons charged with other felonies, or manifest or enormous offenses, not being of good fame; and accessories to felony under the same want of reputation. Finally, a justice of the peace had to bail, upon sufficient surety, persons of good fame charged with a bare suspicion of manslaughter or other inferior homicide; persons charged with petit larceny or any felony not before specified; or with being accessory to any felony. However, the Court of King's Bench, or any judge thereof in time of vacation, had complete discretion to bail or not to bail for any crime whatsoever except persons committed by either House of Parliament, so long as the session lasted, or such as were committed for contempts by any superior courts of justice.[104]

In 1826, a statute[105] repealed all prior statutes relating to bail and made new provisions which, in turn, were superseded by the Indictable Offenses Act of 1848.[106] Section 23 of the 1848 Act gave the justices of the peace discretion either to bail or refuse to bail any person charged with any felony or with certain named misdemeanors.[107] Persons charged with any indictable misdemeanor other than those mentioned in section 23 had to be admitted to bail. In cases of treason no bail was allowed except by order of a Secretary of State or by the Court of Queen's Bench.[108] Section 23 further provided that under the conditions there set forth a justice of the peace might, in his discretion, admit an arrested person to bail

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[101] 2 W. HAWKINS, PLEAS OF THE CROWN ch. 15, at 140-79 (6th ed. 1787) [hereinafter cited as HAWKINS].

[102] 4 BLACKSTONE 298-99; *see* J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 497 n.27 (1944) (the authors state that Blackstone's account is oversimplified and at points misleading).

[103] An approver was a person indicted for treason or a felony who has confessed and accused his accomplices of the same crime in order to obtain a pardon. *See* 4 BLACKSTONE 330.

[104] *Id.* at 298-99.

[105] 7 Geo. 4, c. 64 (1826).

[106] 11 & 12 Vic., c. 42.

[107] These misdemeanors were—(1) assault with intent to commit any felony; (2) attempt to commit a felony; (3) obtaining or attempting to obtain property by false pretenses; (4) receiving property stolen or obtained by false pretenses; (5) perjury or subornation of perjury; (6) concealing the birth of a child; (7) willful or indecent exposure; (8) riot; (9) assault in pursuance of a conspiracy to raise wages; (10) assault upon a police officer in the execution of his duty or upon any persons acting in his

> upon his procuring and producing such surety or sureties as in the opinion of the justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offense; and thereupon such justice shall take the recognizance of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial and not depart without leave. . . .[109]

Evidently, the statute did not require that the discretion should be exercised only with a view toward securing the defendant's appearance at trial. But this seems to have been read into the statute by the Court of Queen's Bench.

On May 8, 1854, the Court of Queen's Bench ruled on an application to admit to bail a prisoner who was charged with fraudulent concealment in bankruptcy proceedings.[110] An affidavit in opposition to to the application stated that attempts had been made by some of the prisoner's relations to tamper with the witnesses, and that it was believed that it would impede the course of justice if the prisoner were let out on bail. The court denied the application for bail because of the severity of the offense and stated that "the test . . . of whether a party ought to be bailed is, whether it is probable the party will appear to take his trial." [111] The test ought to be limited by three considerations–1) the nature and gravity of the crime; 2) the probability of a conviction and the nature of the prosecution's evidence; and 3) the severity of the punishment.[112] In 1898, the Court of Queen's Bench, disapproving a refusal of bail by the committing magistrate, and the court of quarter sessions, stressed that "bail is not intended to be puni-

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aid; (11) neglect or breach of duty as a peace officer; (12) any misdemeanor for the prosecution of which costs may be allowed out of the county rate. *Id.* § 23.

[108] *Id.*

[109] *Id.*

[110] *In re* Robinson, 23 L.J.R.Q.B. (n.s.) 286 (1854).

[111] *Id.*

[112] *Id.*

tive, but merely to secure the attendance of the prisoner at trial or to come for judgment."[113]

At about the same time, the English became aware of the fact that a system which inseparably connected freedom with money was harsh and unfair to those who were not able to pay the price. To remedy this injustice, the Bail Act of 1898 was enacted.[114] The preamble recites that accused persons were sometimes kept in prison for a long time because of their inability to find sureties, although there was no risk of their absconding or other reason why they should not be bailed. The Act then provided that "[w]here a justice has power, under section twenty-three of the Indictable Offenses Act, 1848, to admit to bail for appearance, he may dispense with sureties, if, in his opinion, the so dispensing will not tend to defeat the ends of justice."[115]

It seems that in England as elsewhere the concern for protection of the accused tended to overshadow the concern for community safety, because in 1947 the Court of Criminal Appeal found it necessary to take a strong stand against the indiscriminate release on bail of defendants with a great potential of endangering the community. The Court of Criminal Appeal took the opportunity to state its views on April 15, 1947, in *Rex v. Phillips*.[116] The applicant had been arrested while breaking into a house. He was brought before the magistrates on the same day and released on bail. Subsequently, he was sentenced to four years penal servitude after pleading guilty to two charges of housebreaking and larceny and one of housebreaking with intent. Ten other offenses were considered in sentencing. The court found that this was not excessive punishment and refused Phillips' application to appeal the sentence. Then it expressed its opinion on the magistrates' discretion to release on bail. It found from the record that nine of the offenses had been committed while the applicant was released on bail, and proceeded to recommend strongly that the defendant should not have been released, given the strong possibility that he would commit further crimes.[117]

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[113] Regina v. Rose, 67 L.J.R.Q.B. (n.s.) 289, 292 (1898).

[114] 61 & 62 Vic., c. 7 (1898).

[115] *Id.* § 1.

[116] Rex v. Phillips, 32 Crim. App. 47 (1947).

[117] *Id.* at 48.

> The court feels very strongly that the applicant ought not to have been released on bail. In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail, but some are, and housebreaking particularly

At Cambridge Assizes, on May 19, 1947, the court received support from the Lord Chief Justice. He said:

> I do hope that the magistrates . . . will pay some attention to what the Court of Criminal Appeal recently said in regard to bail in these cases. Time and again the courts find that men with records are charged with offenses which are felonies and . . . are admitted to bail although they do not show the smallest defense, and very often, as in these cases, admit the offense . . . . While they are out on bail they commit other offenses. It is perfectly preposterous that any men with records like these should be let out on bail when there is not the slightest doubt that they have committed the offense, which here they admit.
>
> The magistrates can trust the courts . . . to take into consideration . . . the length of time prisoners have been detained in prison . . . .[118]

A few years later, the Indictable Offenses Act of 1848, with a few exceptions, was repealed by the Magistrates' Courts Act of 1952.[119] Under the 1952 Act, a magistrates' court may commit an accused to custody or it may in all cases, except treason, admit the accused to bail by taking from him a recognizance, with or without sureties, conditioned on his appearance at the time and place of trial. The magistrates' court may also, instead of accepting such recognizances, fix the amount of the recognizances with a view to their being paid subsequently, and in the meantime commit the accused to custody.[120] A person charged with treason cannot be admitted to bail except by order of a judge of the High Court or the Secretary of State.[121]

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> is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offense which can be committed with a considerable measure of safety to the person committing it. There were three charges against the applicant. With regard to one there was no defense and in the case of another he was actually arrested in the act. Yet in spite of all his previous convictions the applicant was given bail, not once but twice, first pending the hearing before the magistrates and again on committal for trial. To turn such a man loose on society until he had received his punishment for . . . an offense which was not in dispute, was, in the view of the Court, a very inadvisable step. They wish the magistrates who release on bail young housebreakers, such as this applicant, to know that in nineteen cases out of twenty it is a mistake.

*Id.*

[118] *Further Observations on Granting Bail by Magistrates*, 32 Crim. App. 80 (1947); *see* Regina v. Gentry, 39 Crim. App. 195, 196 (1955).

[119] 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 132.

[120] *Id.* §§ 7(2), 8, 95; 10 HALSBURY'S LAWS OF ENGLAND ¶ 677 (Simonds ed. 1955) [hereinafter cited as HALSBURY'S LAWS OF ENGLAND].

[121] Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 8.

As before, the statute remained silent as to the way the justices were to exercise their discretion. This was left to the courts which, by decisions, established certain directives. Thus, in cases of murder or attempted murder, bail is usually not granted unless the prosecution consents. In other cases the justices, in exercising their discretion, must consider the nature of the offense, the strength of the evidence, the character or behavior of the accused, and the severity of the punishment in the event the accused is found guilty. When considering bail, the justices may also be told of a prisoner's previous convictions.[122] Generally, bail may properly be refused on four major grounds—1) if the accused is unlikely to attend trial; 2) if the accused may interfere with witnesses or otherwise impede the administration of justice; 3) if the accused may commit other offenses while on bail; and 4) if the accused's detention is necessary for his own protection.[123]

Apparently, many criticized the manner in which the magistrates exercised their discretion. On the one hand, judges complained of undue laxity in the granting of bail, especially after accused persons violated the conditions of bail or committed other offenses while released on bail. On the other hand, it was alleged in Parliament and in the press that magistrates were improperly harsh in refusing bail.[124] As a result, Parliament enacted section 18 of the Criminal Justice Act of 1967.[125] This enactment was an attempt to restrict the discretion of the magistrates in certain cases. However, the restrictions apply only to minor offenses punishable by not more than six months imprisonment. As to these offenses, bail was made mandatory by subsections one, two, and three of section 18, unless certain specified conditions exist. The exceptions to the rule of mandatory bail were so numerous and far reaching, however, that they cover most of the cases in which bail had been refused in the past.[126] Consequently, the law has changed little. But subsection five, which contains the exceptions, had the effect of establishing a general guide for the magistrates on how to exercise their discretion.

Subsection five of section 18[127] provides that a magistrate's court is not required to commit a person on bail in certain cases—1) where he is charged with an offense punishable with imprisonment for a term not less than six months and where he has previously been sentenced to imprisonment; 2) where he has previously failed to comply with conditions of recognizance while on bail;[128] 3) where he is charged with an offense allegedly committed while on bail; 4) where detention is necessary to establish identity and address; 5) where the accused has no fixed abode or ordinarily resides outside the United Kingdom; 6) where the offense charged is violent; 7) where the accused is likely to commit an offense while on bail; or 8) where it is necessary for his own protection to detain him. Finally, subsection eight[129] provides that where a magistrates' court refuses either under subsection five of section 18 or otherwise to commit any such person to bail,[130] the court shall, if he is not represented, or if his counsel so requests, give him a written notice stating the reasons for the refusal.

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[122] *See* 10 HALSBURY'S LAWS OF ENGLAND ¶ 678.

[123] *Hearings on S. 3034 Before the Senate Comm. on the District of Columbia*, 91st Cong., 1st Sess., pt. 6, at 1676-92 (1969) (Testimony of Frank Milton, Chief Metropolitan Magistrate, London).

[124] *Id.* at 1677.

[125] Criminal Justice Act, 1967, c. 80, § 18.

[126] *Hearings on S. 3034 Before the Senate Comm. on the District of Columbia*, 91st Cong., 1st Sess., pt. 6, at 1677 (1969).

[127] Criminal Justice Act, 1967, c. 80, § 18(5).

### COLONIAL BAIL PROVISIONS

When Goebel and Naughton examined the bail practices in colonial New York, they came to the conclusion that the point of departure adopted in the colonies regarding bail was not the admittedly unlimited discretion of the justices of the King's Bench to bail, but rather the nondiscretionary powers of the English justices of the peace.[131] Early statutes support this observation with respect to other colonies. They indicate that those colonies wished to limit the discretionary bailing power of their judges in order to assure criminal defendants a right to bail in noncapital cases.

The earliest provision concerning bail is found in the Body of Liberties of the Massachusetts Colonie of 1641.[132] This provision required that the accused give surety both for appearance and good behavior. In addition, if one considers the large number of capital crimes of that time,[133] it is evident that the freedom loving colonists were not willing to release on bail any person whom they considered dangerous. Moreover, following the English pattern, the law excluded bail in contempt cases[134] and reserved to the legislature a corrective power to exclude bail in individual cases.

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[128] *Id.* Section 21 permits the imposition of special conditions of bail. *Id.* § 21.

[129] *Id.* § 18(8).

[130] This covers any case of refusal to commit for trial on bail. *See* 47 HALSBURY'S STATUTES OF ENGLAND 995-98 (Yonge ed. 1968).

[131] J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 497-98 (1944).

[132]
> No mans person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court [viz. the legislature] doth allow it.

THE COLONIAL LAWS OF MASSACHUSETTS § 18, at 37 (W. Whitmore ed. 1889).

[133] The revised laws and liberties of 1647 list as "Capital Lawes" of colonial Massa-

The second colony to provide for a right to bail in noncapital cases was Pennsylvania in 1682. Section XI of the Laws Agreed Upon in England, which formed part of the Frame of Government of Pennsylvania, 1682 provided "[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." [135]

In 1683, New York enacted a Charter of Liberties and Privileges, which provided:

> 19. That In all Cases whatsoever Bayle by sufficient Suretyes Shall be allowed and taken unlesse for treason or felony plainly and specially Expressed and menconed in the warrant of Committment provided Alwayes that nothing herein contained shall Extend to discharge out of prison upon bayle any person taken in Execucon for debts or otherwise legally sentenced by the Judgment of any of the Courts of Record within the province.[136]

Other colonies, such as Maryland, followed the English statutes, particularly the Statute Westminster I and that of 1554.[137]

This tendency to deprive judges of discretionary power in noncapital cases culminated in the Northwest Territory Ordinance of 1787,[138] enacted by the Continental Congress. The bail provision contained in the Ordinance closely followed the text of the Pennsylvania

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chusetts–(1) Idolatrie; (2) Witch-craft; (3) Blasphemie; (4) Wilful Murther; (5) Slaying in Anger or Cruelty of passion; (6) Poysoning; (7)Bestialitie (carnal copulation with any beast); (8) Sodomie (homosexuality); (9) Adulterie; (10) Manstealing; (11) False-witness; (12) Conspiring or attempting invasion, insurrection, or public rebellion against the Commonwealth, or treacherously attempt the alteration or subversion of the frame of government; (13) Child over 16 years old cursing or smiting his parent; (14) Son over 16 rebelling against his parents; or (15) Rape. THE LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 5 (M. Farrand ed. 1648).

[134] 4 BLACKSTONE 300; 2 HAWKINS 164.

[135] 5 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3052, 3061 (1909) [hereinafter cited as THORPE].

[136] 1 C. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 95 (1906).

[137] 3 Edw. 1, c. 15 (1275); 1 & 2 Phil. & M. (1554); *see* E. BROWN, BRITISH STATUTES IN AMERICAN LAW 214 (1964); KILTY, A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES 209-10 (1811). *See also* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 974 n. 75 (1965).

[138] 1 Stat. 13.

law. It provided that "[a]ll persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great." [139]

### FEDERAL BAIL PROVISIONS IN THE UNITED STATES

Const.

*The Legal Provisions.* The only place where bail is mentioned in the United States Constitution is in the eighth amendment. There it is said: "Excessive bail shall not be required . . . ." [140] The eighth amendment says nothing about a right to bail. The question of whether and on what conditions a person arrested for a crime has a right to be released pending the disposition of his case has, on the federal level, always been regulated by statutes.

Jud. Act. of 1789

The first such provision was enacted by Congress in the Judiciary Act of 1789. It followed the colonial trend of excluding discretion and making bail mandatory in noncapital cases in which arrested persons were given a right to be admitted to bail, while the federal judges received discretionary authority to grant or deny release on bail to persons charged with a capital crime.[141] It should be noted that these statutes draw no distinction between bail before and after conviction. Apparently, the statutes have always been interpreted as regulating bail only upon arrest and before trial, and the power to grant bail pending an appeal or writ of certiorari was based on later statutes regulating review on appeal and authorizing the courts to prescribe rules and regulations.[142]

FRCP 46

Express federal rules governing release on bail before and after conviction were established in 1946 in Rule 46 of the Federal Rules of Criminal Procedure. Rule 46 provides that, before conviction, a person arrested for an offense not punishable by death shall be admitted to bail, and that a person arrested for an offense punishable by death may be admitted to bail at the discretion of any court or judge authorized by law to do so. After conviction and while an appeal or application for certiorari is pending, bail may be allowed by the trial judge, by the court of appeals or any judge thereof, or by the circuit judge, unless it appears that the appeal is frivolous or taken for delay.[143]

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[139] *Id.* art. 2, at 15.

[140] U.S. CONST. amend. 8.

[141]
> And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law.

Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91, *as amended*, 18 U.S.C. § 3141 (1970).

[142] *See* Hudson v. Parker, 156 U.S. 277, 285-87 (1895); *In re* Classen, 140 U.S. 200, 208 (1891); *cf.* 156 U.S. at 290-95 (Brewer & Brown, JJ., dissenting). *See also* United States v. Motlow, 10 F.2d 657, 660 (7th Cir. 1926) ("Petitioners argue that, as the language of the Constitution and Statutes is general, bail is a matter of right after conviction pending review, as well as before trial. But the courts have drawn a distinction."); *Appendix, Amendments to Rules*, 139 U.S. 705 (1891).

The obvious unfairness of the bail system for the poor—the great majority of the defendants—led to various studies concerning the functioning and the efficacy of the system. These studies revealed that the bail system provided no assurance of release before trial for those unable to post bail, and that in many cases bail was no guarantee against flight because the defendant who had paid a nonreturnable premium to a professional bondsman incurred no financial loss if he fled unless he had been forced to furnish collateral. They also indicated that courts often imposed high bail to keep dangerous defendants in jail, a practice wholly ineffective in case of dangerous defendants with ample means.[144]

In order to alleviate the plight of the poorer defendant, at least on the federal level, Congress enacted section 3(a) of the Bail Reform Act of 1966.[145] It provides that any person charged with a noncapital offense shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines that such release will not reasonably assure the appearance of the person as required. In that case, the officer shall impose one or more specified conditions "deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours,"[146] and including the execution of the traditional bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.[147] In capital cases and after conviction, however, if "the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community," the accused may be detained.[148]

Bail Reform
Actof 1966

With the exception of the District of Columbia, the Bail Reform Act of 1966 applies only to federal crimes. Common law crimes and practically all crimes of violence such as rape, robbery, burglary are subject to the state laws, and as to those crimes the Bail Reform Act of 1966 is inapplicable outside of the District of Columbia. However, in the District, the Bail Reform Act of 1966 applied to all crimes—common law crimes and those crimes regulated by federal statutes of both general and local applicability. It was therefore in the District of Columbia that the weaknesses of the Act became most obvious. By providing expressly that the judicial officer, in determining conditions of release, may consider both danger of flight and the safety of other persons or the community in capital cases and after conviction, but only danger of flight in noncapital cases or before conviction, Congress made it clear that the dangerousness of a defendant was not to be considered in noncapital cases and before conviction. Consequently, some judges were reluctant to use the time honored method of high money bail to prevent the release of a dangerous defendant. As a result, a significant number of cases arose in the District in which persons charged with serious crimes of violence committed other crimes while released on their personal recognizance, and again obtained release on nominal bail.[149] As a remedy, the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia recommended in May 1969, that a court should be permitted, in its discretion, to deny bail 1) where a person allegedly committed a crime of violence while on bail, probation, parole, or within a reasonable time following the completion of a sentence; 2) where a defendant is charged with certain high risk crimes of violence and will pose a danger to the community if released; 3) where a defendant is a narcotics addict with a habit so costly that it can only be supported by crime; and 4) where individuals, who allegedly committed crimes in the context of civil disorder, pose a grave danger to the community.[150] After extensive hearings and debates, Congress replaced the provisions of the Bail Reform Act of 1966 for the District of Columbia with new provisions for release and detention of persons charged with crimes in the District.[151]

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[143] FED. R. CRIM. P. 46.

[144] *See* D. FREED & P. WALD, BAIL IN THE UNITED STATES, 1964. *See also* S. REP. No. 750, 89th Cong., 1st Sess. 6 (1965) (criticism of effectiveness of money bail to accomplish its goals—assurance that the accused will appear for trial).

[145] 18 U.S.C. §§ 3146-52 (1970).

[146] *Id.* § 3146(a).

[147] *Id.* § 3146.

[148] *Id.* § 3148.

weakness of B.R.A. of '66

Section 23-1321(a)-(g) of the District of Columbia Court Reform and Criminal Procedure Act of 1970 substantially reenacts the provisions of the Bail Reform Act of 1966 concerning pretrial release in noncapital cases except that the judicial officer in determining the conditions of release may take into account not only danger of flight but also the safety of other persons and the community. No financial con-

1970 Act
Pretrial
Detention

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[149] *1970 Preventive Detention Hearings* 330, 333-38 (statement of George L. Hart, Judge, U.S. District Court for the District of Columbia).

[150] *See id.* at 703, 736-37.

[151] D.C. CODE ANN. §§ 23-1321 to 32 (Supp. IV, 1971). *See also* Rauh & Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 AM. U.L. REV. 252, 287-302 (1971).

dition may be imposed to assure the safety of any other person or the community, since a money bond cannot protect other persons against a dangerous defendant. Section 23-1321(h) is new. It provides that a person detained pursuant to the new provisions shall be confined, to the extent practicable, in facilities separate from convicted persons, shall be afforded reasonable opportunity to consult privately with counsel, and, for good cause shown, shall be released upon order of the judicial officer in the custody of an appropriate person for limited periods of time to prepare defenses or for other proper reasons.

Section 23-1322 regulates detention prior to trial. It provides that a judicial officer may order pretrial detention not exceeding 60 days in certain situations. First, a person charged with a dangerous crime[152] may be detained upon government certification that based on the person's pattern of behavior, the nature and circumstances of the alleged offense, the weight of evidence, such person's community ties, employment, his financial resources, his character and mental condition, and his record of conviction, there is no set of conditions which will reasonably assure the safety of the community.[153] Second, the court may detain a person charged with a crime of violence[154] who is a narcotic addict,[155] who has been convicted of a crime of violence within the past ten years, or who is on bail or other release or on probation, parole or mandatory release pending completion of a sentence for another crime of violence.[156] Finally, a person charged with an offense may be detained if, for the purpose of obstructing justice, he threatens, injures, or intimidates any prospective witness or juror, or attempts to do so.[157]

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[152] Section 23-1331(3) defines a dangerous crime as:

> (A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) forcible rape, or assault with intent to commit forcible rape, or (E) unlawful sale or distribution of a narcotic or depressant or stimulant drug (as defined by any Act of Congress) if the offense is punishable by imprisonment for more than one year.

D.C. CODE ANN. § 23-1331(3) (Supp. IV, 1971).

[153] *Id.* §§ 23-1321(b), 23-1322(a)(1).

[154] Section 23-1331(4) defines a crime of violence as:

> Murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses, as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

*Id.* § 23-1331(4).

[155] *Id.* § 23-1323.

[156] *Id.* § 23-1322(a)(2).

Detention may only be ordered after a hearing before a judicial officer held immediately after the accused is taken into custody.[158] A continuance not to exceed five days may be granted upon motion of the accused, or for up to three days upon motion of the United States Attorney. The accused is entitled to be represented by counsel, to present information, to testify, and to present witnesses in his own behalf. Information given in connection with this hearing need not conform to the rules pertaining to the admissibility of evidence. Any testimony the accused may give during the hearing is not admissible on the issue of guilt in any other judicial proceedings, but is admissible in proceedings for the violation of any of the conditions of release and for impeachment purposes.[159]

No person may be ordered detained unless at the conclusion of the hearing the judicial officer makes the following findings and issues an order of detention accompanied by written findings of fact and the reasons for its entry—1) that there is clear and convincing evidence that the accused falls into one of the categories subject to detention; 2) that no condition or combination of conditions will reasonably assure the safety of the community; and 3) that, except for a charge of obstructing or attempting to obstruct justice, there is substantial probability that the accused committed the offense with which he is charged.[160] Both the defendant and the government are given a right of review and appeal,[161] and if a defendant is ordered detained his trial shall be given priority.[162]

If a defendant is charged with a capital crime, similar provisions apply as in the Bail Reform Act of 1966. He may be released on any of the conditions of release applicable to noncapital defendants, unless the judicial officer has reason to believe that no one or more conditions of release will reasonably assure that the accused will not flee or pose a danger to any other person or to the community, in which case he may be detained. Pending appeal or writ of certiorari, the defendant shall be detained unless the judicial officer finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to any other person or to the property of others, and that the appeal and petition for a writ of certiorari raises a substantial question of law or fact likely to result in a reversal or an order for a new trial. If release is ordered, the same provisions which govern pretrial release in non-capital cases apply.[163] Finally, the new Act prescribes sanctions for failure to appear, for offenses committed during release, if convicted, in addition to any other applicable penalties, and for violations of conditions of release.[164] All of these provisions went into effect on February 1, 1971.

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[157] *Id.* § 23-1322(a)(3).

[158] *Id.* § 23-1322(c).

[159] *Id.* §§ 23-1322(c), 23-1327 to 29.

[160] *Id.* § 23-1322(b).

[161] *Id.* § 23-1324.

[162] *Id.* § 23-1322(d).

As can be seen from the above description, the drafters of the new Act have taken great pains to enumerate and define the conditions on which pretrial detention may be ordered. Apparently they tried to protect the Act against attacks on constitutional grounds. But in the process they left practically no room for the exercise of a reasonable judicial discretion. Two cases illustrate the difficulties created by over-specific conditions.

little room for judicial discretion

The first case concerned George Martin, Jr.[165] He was charged with assault with a dangerous weapon after attacking his wife with a machete and badly injuring her. The crime was a crime of violence within the meaning of the Act, but the defendant did not meet any of the other qualifications which would have permitted his detention. He had made many threats before he committed the crime, but he had no prior conviction and he was not on bail or other release with respect to another crime of violence. He was a school teacher with good community ties. He would have to be released under the Act, although an obvious threat to his wife. Upon motion of defense counsel, the judge sent the defendant to Saint Elizabeth's Hospital for an evaluation of his mental responsibility and his competency to stand trial. The judge also imposed $100,000 bail in order to prevent his release when the hospital discharged him.[166]

In the second case, Raul Maisonet[167] also was charged with assault with a dangerous weapon, after having fired two shots at his intended victim. Two police officers were near the scene of the crime, and one actually saw Maisonet fire the second shot. The officers arrested him. When Maisonet appeared before the judge, no FBI record was available because he had been in the District of Columbia only a short while. Since he was working in a local hotel, he was discharged on his own recognizance. On the same day he telephoned his intended victim, the complaining witness, and said that he was waiting outside of his residence to kill him. The complaining witness called the police, but when the officers arrived, Maisonet had left. Thereupon the complaining witness swore out a warrant for the defendant's arrest. Maisonet continued to call the complaining witness' residence. One day the police received an anonymous telephone call that Maisonet was sitting in front of the intended victim's house. The police promptly arrested Maisonet and charged him with obstruction of justice. At his second appearance before Judge Halleck, his FBI record was available. It revealed that Maisonet had a long criminal record from various jurisdictions. In 1957 he was convicted of manslaughter and sentenced from two to 15 years in prison. His sentence and post-sentence release period expired in 1965. Before coming to the District, he had been out on bail with respect to a crime of violence in the Virgin Islands—which had been revoked. When he appeared before Judge Halleck on the charge of obstructing justice, the judge attempted to hold him under the pretrial detention provisions of the new Act, but the accused did not fit into any of the definitions. He could not be held under Section 23-1322(a)(3) because, although he had actually threatened and intimidated a prospective witness, he had not done so "for the purpose of obstructing justice." He also could not be held pursuant to Section 23-1322(a)(2) under the charge of assault with a dangerous weapon, because he was no longer on bail with respect to another crime of violence, his bail having been revoked; and he had not been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he was charged in 1971. For part of that period he was in jail serving a sentence for a crime of violence. Therefore, Judge Halleck revoked the release on personal recognizance which had been granted to the defendant in connection with the charge of assault with a dangerous weapon and imposed bail in the amount of $50,000.[168]

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[163] *Compare* D.C. CODE ANN. § 23-1325 (Supp. IV, 1971) *with* 18 U.S.C. § 3148 (1970).

[164] D.C. CODE ANN. §§ 23-1327 to 29 (Supp. IV, 1971).

[165] United States v. Martin, Crim. No. 37482-71 (D.C. Super. Ct., Jan. 7, 1972).

[166] Telephone interview with Judge Charles Halleck, Superior Court of the District of Columbia, March, 1971; interview with Robert A. Jones, Assistant United States Attorney, March, 1971.

[167] United States v. Maisonet, Crim. No. 17980-71 (D.C. Super. Ct., May 28, 1971).

In both cases the judge resorted to the customary method of imposing high money bail in order to prevent pretrial release of dangerous defendants. If the discretionary power to detain dangerous defendants which is given to the judge in capital cases and those pending appeal under the Bail Reform Act of 1966 had been extended to noncapital cases prior to trial, Judge Halleck would have been able to deal with the problem openly and directly.[169]

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[168] Telephone interview with Judge Charles Halleck, Superior Court of the District of Columbia, March, 1971; interview with Robert A. Jones, Assistant United States Attorney, March, 1971.

*Court Decisions.* The decisions of the federal courts which deal with the question of release on bail, with the sole exception of *Trimble v. Stone*,[170] have been based on statutory grounds.[171] *Trimble* concerned a 15 year old juvenile arrested on a charge of sexual assault and detained under the Juvenile Court Act for the District of Columbia.[172] The juvenile applied to the United States District Court for a writ of habeas corpus and requested to be admitted to bail pending disposition of the charges against him in the Juvenile Court. The Juvenile Court Act provided that juveniles taken into custody should either be released into the custody of a parent or other responsible person or detained in a place of detention designated for such purpose, but it made no provision for release on bail. District Judge Holtzoff held that the United States Constitution guarantees the "right to bail before trial, except in capital cases," that this right is "absolute," that the higher law of the Constitution prevails over the Juvenile Court Act, and that therefore the petitioner must be admitted to bail.[173]

Trimble

If this case had been appealed, it probably would have been overruled, as indicated by *Fulwood v. Stone*.[174] In that case a 16 year old juvenile was detained under the same Juvenile Court Act on a charge of robbery and assault. Notwithstanding *Trimble* the Juvenile Court refused release on bail, and in a habeas corpus proceeding the juvenile requested the district court to be admitted to bail. That court, following *Trimble*, held that "a child accused of a delinquent act has an absolute constitutional right to bail,"[175] and ordered the juvenile released on $3,500 bond. Unable to meet this amount, the juvenile made

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[169] One frequent objection has been that judges are unable to determine that a person may endanger the community if released. However, judges apparently have experienced no difficulty in making such determination. *See* Russel v. United States, 131 U.S. App. D.C. 44, 402 F.2d 185 (1968) (the United States Court of Appeals for the District of Columbia Circuit sua sponte vacated the appeal bond ordered by the district judge because the defendants' release would present a danger to the community).

[170] 187 F. Supp. 483 (D.D.C. 1960).

[171] Advocates of a constitutional right to bail are able to cite only three cases, aside from *Trimble*, which contain dicta to the effect that there is a right to bail guaranteed or at least implied by the United States Constitution. *See* United States v. Motlow, 10 F.2d 657, 659, 662 (7th Cir. 1926); Dye v. Cox, 125 F. Supp. 714, 715 (E.D. Va. 1954); United States v. Fah Chung, 132 F. 109, 110 (S.D. Ga. 1904). *See also* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 399 n.117 (1970).

Note - only 3 cases

[172] Ch. 309, 52 Stat. 596-605 (1938), *as amended*, D.C. CODE ANN. §§ 16-2301 to 37 (Supp. IV, 1971).

[173] 187 F. Supp. at 484-88.

[174] 129 U.S. App. D.C. 314, 394 F.2d 939 (1967).

[175] *Id.* at 316, 394 F.2d at 941.

Trimble weakened....

a motion for release on personal recognizance or a $500 secured appearance bond. His motion was denied, but the juvenile was granted leave to appeal *in forma pauperis* to the United States Court of Appeals for the District of Columbia. That court found that the issue should be determined by construction of the Juvenile Court Act, and that there was no need to reach the question of whether there is a constitutional right to bail in juvenile proceedings.[176] The court further found that the Juvenile Court Act for the District of Columbia provided an adequate substitute for bail and indicated that pretrial detention in a proper detention home would not necessarily violate the Constitution. Consequently, it vacated the judgment of the district court and remanded the case for reconsideration of the question of pretrial detention by the Juvenile Court.[177] Thus, the *Trimble* case, a district court decision, stands alone, without precedent and without following. It was disregarded in the provisions of the new act regulating custody and detention of children.[178]

Stack

Advocates of the proposition that there is a constitutional right to bail usually cite in support of their position the Supreme Court's opinion in *Stack v. Boyle.*[179] However, the question before the Court in *Stack* was excessive bail, not a denial of bail. Only a few months later, the Court decided *Carlson* v. *Landon.*[180] There the constitutionality of a denial of bail authorized by a federal statute was directly in issue, and the Court held that Congress constitutionally may provide for denial of bail for persons arrested pursuant to federal law. The fact that Chief Justice Vinson, author of the *Stack* opinion, joined in the Court's opinion in *Carlson* should make it sufficiently clear that *Stack* cannot be invoked as authority for a constitutional right to bail.

So far, *Carlson* has remained the only Supreme Court case in which the question of a constitutional right to bail was in issue. It concerned active alien communists under deportation proceedings who were detained without bail pursuant to section 23 of the Internal Security Act[181] which gave the Attorney General discretion to detain such aliens without bail. The aliens filed petitions for habeas corpus alleging that the detention without bond violated fifth amendment due process and

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[176] *Id.* at 318, 394 F.2d at 943.

[177] *Id.* at 319, 394 F.2d at 944.

[178] *See* D.C. CODE ANN. § 16-2310(a)(1) (Supp. IV, 1971); *cf.* United States v. Gilbert, 138 U.S. App. D.C. 59, 425 F.2d 490 (1969) (courts have inherent power to confine a defendant before as well as during trial in order to protect future witnesses).

[179] 342 U.S. 1 (1951); *see* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 VA. L. REV. 371, 399 n.117 (1970).

[180] 342 U.S. 524 (1952).

[181] Ch. 1024, § 23, 64 Stat. 1010 (1950), *repealed,* Ch. 477, § 403(c)(31), 66 Stat. 279 (1952).

Carlson

the eighth amendment. The Attorney General defended his orders on the ground that there was reasonable cause to believe that petitioners' release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. The Supreme Court held that there was no violation either of the fifth or eighth amendment.[182]

Lower federal courts followed *Carlson* when the same question arose with respect to the constitutionality of state laws. They also offer an example of how "authority" can be created in federal courts. In 1963, the United States Court of Appeals for the Eighth Circuit simply decreed in *Pilkinton v. Circuit Court*,[183] that "the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment." The fourteenth amendment provides for no such thing.[184] But later court decisions followed suit citing *Pilkinton* as "authority."[185] Consequently, criminal defendants in state prosecutions brought federal writs of habeas corpus, claiming that denial of bail before trial in a noncapital case violated the eighth and fourteenth amendments to the United States Constitution. The courts rejected these contentions.

Thus in *United States* ex rel. *Covington v. Coparo*,[186] the defendant was denied release on bail before trial under a New York statute which leaves admission to bail in felony cases to the discretion of the court.[187] The prosecution had opposed his release on the ground that the defendant had a criminal record, that he was a professional hired killer, and that if released on bail, he was unlikely to appear for trial. The federal district court dismissed the habeas corpus petition. Citing *Carlson v. Landon* where the Supreme Court had said that it was within congressional competence to define those classes of cases in which bail shall be allowed, the court explained that state legislatures also may define the classes of crimes which are bailable as a matter of right and which are not.[188] The court concluded that since the release of the defendant might constitute a danger to the community, the "granting of bail under such circumstances might well amount to irresponsible judicial action." [189]

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[182] In response to the petitioner's eighth amendment contention, the Court concluded:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.

342 U.S. at 545-46 (footnotes omitted).

[183] 324 F.2d 45, 46 (8th Cir. 1963).

[184] In part II of this article, to be published in Volume 60, Issue 6 of *Georgetown Law Journal*, Dr. Meyer discusses the use of the fourteenth amendment to extend the first ten amendments to the states.

[185] *See* Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203, 205 (S.D.N.Y. 1969); United States *ex rel.* Fink v. Heyd, 287 F. Supp. 716, 717 (E.D. La. 1968); Wansley v. Wilkerson, 263 F. Supp. 54, 56 (W.D. Va. 1967).

[186] 297 F. Supp. 203 (S.D.N.Y. 1969).

[187] N.Y. CODE CRIM. PRO. §§ 552, 553 (McKinney Supp. 1971).

Similarly, in *Wansley v. Wilkerson*,[190] the defendant was denied release on bail under a Virginia statute[191] while awaiting retrial for rape and robbery. He petitioned the federal district court for a writ of habeas corpus, contending that his detention by state authorities was inconsistent with the eighth and fourteenth amendments to the United States Constitution. The court denied the petition, holding that a state may constitutionally provide by statute that bail be granted in some cases and denied in others; and it may constitutionally leave to the discretion of the trial court the grant or denial of bail and the fixing of its amount. The only proscription is that "the state and trial court must act reasonably and not arbitrarily or discriminatorily." [192] The court found that all pertinent facts in the case pointed to a reasoned determination by the trial judge and negated any argument of an arbitrary or discriminatory denial of bail. It concluded that the trial judge may deny bail completely if, regardless of the amount, the accused will be unlikely to be present at the trial or if release of the accused will endanger the safety of the community.[193]

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[188] The court concluded:

> And as Congress is free, within constitutional limits, to define the classes of crimes which are bailable as a matter of right and those that are not, so too, may the state legislatures. While the Supreme Court has not passed upon the direct issue, those federal courts which have are in accord that the Eighth and Fourteenth Amendments do not require the state to grant bail in all cases as a matter of right; all have recognized that a state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, provided that the power is exercised rationally, reasonably and without discrimination.

297 F. Supp. at 206, *citing* Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); United States *ex rel.* Hyde v. McMann, 263 F.2d 940, 943 (2d Cir.), *cert. denied*, 360 U.S. 937 (1959); United States *ex rel.* Fink v. Heyd, 287 F. Supp. 716, 717-18 (E.D. La. 1968); Wansley v. Wilkerson, 263 F. Supp. 54, 57 (W.D. Va. 1967).

[189] 297 F. Supp. at 207, *citing* Rehman v. California, 85 S. Ct. 8 (1964) (Douglas, Cir. J.); Carbo v. United States, 82 S. Ct. 662 (1962) (Douglas, Cir. J.).

[190] 263 F. Supp. 54 (W.D. Va. 1967).

[191] VA. CODE ANN. § 19.1-112 (Cum. Supp. 1971).

[192] 263 F. Supp. at 57.

[193] *Id.*

It is obvious that the courts have rejected the contention that the United States Constitution guarantees an absolute right to at least pretrial release on bail. But neither have they said that the Constitution permits legislatures to make all arrests nonbailable. However, it seems clear that the courts were not primarily concerned with the preservation of the bail system, but with the question of the rights of persons arrested on a criminal charge to be free pending trial. District Judge Speer expressed this clearly in *United States v. Fah Chung*,[194] where he said—"If, then, it be unlawful under our system to deprive any person of his liberty by fixing excessive bail, which he cannot give, a fortiori would it seem also unlawful to deprive him of his liberty by refusing bail altogether." [195] Bail is seen here only as the conduit through which liberty can be obtained and, unfortunately, as the only conduit. Under such circumstances it is easy to identify bail with freedom, a grave error, because as will be shown, bail has traditionally been used as an instrument to put people into jail, not merely to get them out.

### BAIL AND THE LIBERTY OF THE INDIVIDUAL

In colonial New York there was no insistence upon a right to bail in the various petitions of prisoners who languished in jail, sometimes without even being indicted. Neither defendants nor courts approached the matter in terms of right.[196] Bail was regarded not primarily as a surrogate of imprisonment, but rather as a device to assure the orderly functioning of the judicial process.[197] This concept of bail was merely a continuation of English bail practices.

It is an error to believe that the main purpose of the English bail system has always been the protection of the liberty of the individual. Quite the contrary is true. Originally it was used to gain control over the individual in order to force him to fulfill his legal obligations. The Anglo-Saxons used an elaborate surety system to facilitate control by the authorities over their subjects by making a communal or individual surety responsible for the lawful behavior of each man, and this practice was continued for some time by the Normans.[198] For example, under the *frankpledge* system, all persons, unless exempt, had to be enrolled in a *tithing*—a group of ten men presided over by a *tithing* man. If one of them committed an offense, the others had to produce him for trial. If they did not, they had to make good the damage caused by the offender and pay a fine. Thus, the *frankpledge* system was a system of compulsory collective bail as a safeguard against prospective crimes.[199]

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[194] 132 F. 109 (S.D. Ga. 1904).

[195] *Id.* at 110.

[196] J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 502 (1944).

[197] *Id.* at 507.

[198] DE HAAS 16.

In later periods bail, or bond, or arrest was regularly used against suspicious persons as means of crime prevention.[200] In the 18th century, Blackstone spoke proudly of the English system of preventing crime.

> This preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehavior to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behavior.[201]

This power to require a bond, not in case of an arrest for a crime committed, but for what a magistrate anticipated as a threat of future crimes, with power to imprison for failure to give the required bond, has been adopted by a number of American states.[202] Another well known American example of colonial origin where bail is used for the purpose of detention and not for the purpose of release is the case of material witnesses who can be forced to furnish bail or be imprisoned in order to secure their presence at the trial.[203]

witnesses can
be detained if
refuse bail

It is easy to understand, however, that pretrial release on bail came to be regarded as a precious benefit to the individual, once arrest—instead of the summons—had become the customary way of commencing criminal proceedings.[204] Considering the deplorable prison conditions, the length of time between arrest and trial, the fact that until recently the law made no provisions for crediting preliminary detention toward service of a prison sentence or for compensation in case of dismissal or acquittal for want of guilt,[205] and the fact that until 1898 in England and 1966 in the United States bail was the only way to obtain release, it is not surprising that arrested persons were willing to pay a high price for release until trial, provided, of course, that they were able to pay.[206] If they were not, the bail system was of no use to them at all. To those people, any claim that release on bail might have anything to do with the protection of individual liberties would have appeared to be a cruel hoax. It took the English until 1898, and the Americans until 1966, to become aware of the essential unfairness of a system which made the right to remain free between arrest and trial dependent on the payment of a sum of money.

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[199] 1 HOLDSWORTH 13.

[200] *See* Assize of Clarendon (1166) §§ 14-16, *reprinted in* STUBBS 144-45; Writ for the Conservation of the Peace (1233), *reprinted in* STUBBS 362; 5 Edw. 3, c. 14 (1331); 34 Edw. 3, c. 1 (1360). The last mentioned statute gave justices of the peace power to inquire of all those who had been plunderers and robbers, had departed and returned as vagrants and, as before, did not want to work, and to arrest all those whom they could find by indictment or by suspicion and put them in prison, and to take from those who are of good fame sufficient surety for the good behavior toward the King and his people. *See also* 2 POLLOCK & MAITLAND 583.

[201] 4 BLACKSTONE 251.

[202] *See* Note, *Peace and Behavior Bonds—Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914 (1966); Note, *"Preventive Justice"—Bonds to Keep the Peace and for Good Behavior*, 88 U. PA. L. REV. 331 (1940).

[203] *See, e.g.*, 18 U.S.C. § 3149 (1970); D.C. CODE ANN. § 23-1326 (Supp. IV, 1971); FED. R. CRIM. P. 46(b).

[204] In the common law system, and even in the United States today, arrest is still being used in civil proceedings with bail as the only quick way to freedom. *See* N.Y. CIV. PRAC. LAW §§ 5250, 6101-18 (McKinney 1963); N.C. GEN. STAT. §§ 1-409 to 23 (1969).

As far as an absolute right to release on bail before trial is concerned, such a right has never been recognized in England. As has been shown, under the Statute of Westminster I no right to release on bail existed for any major crimes.[207] In those cases, bail could not be allowed by any sheriff and—later—justice of the peace but only by the King or the justices of the High Court in their discretion. With respect to lesser crimes, there was a right to be bailed by the justices of the peace, but the King and those delegated by him could always make a person nonbailable in a particular case. Subsequently, the absolute powers of the King passed to Parliament.[208] In England then, there was always a method available to refuse bail when the common interest so required.

Beginning in 1826 justices of the peace also received discretionary power to bail or to refuse bail in all felonies and all serious misdemeanors, and there was a right to release on bail for persons charged with minor offenses. But, this became subject to so many exceptions that it was possible for the magistrates to balance communal safety with the individual's interest in freedom until the disposition of his case.[209]

As is well known, the 18th and 19th centuries witnessed a reaction against the harsh treatment to which suspicious and accused persons had been subjected by the authorities for many centuries. The result was a strengthening of the protections of the criminally accused. In England that period saw the enactment of the law permitting pretrial release of poor persons on a recognizance without sureties, and a liberal practice of releasing prisoners under the sole test of likelihood of appearance at trial.[210] But when subsequently the need arose to protect the community against crimes committed by persons out on bail the discretionary power enabled the judges to consider this factor in their decisions and to refuse to release criminal defendants with a potential of endangering the community.

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[205] *See* Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738, *as amended*, 18 U.S.C. § 3568 (1970); D.C. CODE ANN. § 23-1322(e) (Supp. IV, 1971) (credit for preliminary detention).

[206] *See* DE HAAS 78-83.

[207] 3 Edw. 1, c. 15 (1275); *see* note 92 *supra* and accompanying text.

[208] 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 127 (1847). *See generally* T. MAY, TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 28 (16th ed. 1957).

[209] *See* notes 100-104 *supra* and accompanying text.

The American colonies were greatly influenced by English law, some of them to the point of continuing the English bail statutes until their independence. But at the same time there was in other colonies a clear trend to limiting judicial discretionary power in order to assure criminal defendants release on bail in noncapital cases.[211] Provisions of this kind have found their way into many state constitutions, but on the federal level such regulations have always been statutory.

Because in the Anglo-American legal system bail for so long has been the only medium through which freedom after arrest could be obtained, the right to bail has become identified with the right to freedom before conviction. This probably explains why persons concerned with individual liberties have attempted to read a right to bail into the United States Constitution. However, when the original states proposed the Federal Bill of Rights, they indicated no intention of creating a federal constitutional right to bail.

## CONSTITUTIONAL ISSUES

The question is whether the United States Constitution has made provisions regulating detention and release of persons arrested for an alleged crime so as to prevent Congress from legislating in this field. The Constitution clearly permits arrest and detention[212] prior to adjudication of guilt. The fourth amendment says that no warrant for the arrest of a person shall issue "but upon probable cause," and the fifth amendment says that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law." Thus the Constitution requires that a person arrested upon probable cause for a capital or infamous crime must be released if the grand jury does not return an indictment, but otherwise it does not specify the conditions on which an arrested person may be held or released. It merely leaves it to "due process of law."[213]

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[210] Bail Act of 1898, 61 & 62 Vic., c. 7 (1898); *see* notes 114-115 *supra* and accompanying text.

[211] *See* notes 131-139 *supra* and accompanying text.

[212] *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.").

imprisonment
is not
necessarily
punishment....

Nevertheless, the critics of the new pretrial detention provisions have claimed that this legislation is unconstitutional because it violates 1) the eighth amendment's guarantee of reasonable bail which is said to implicitly guarantee a right to bail in all noncapital cases; 2) the fifth amendment's guarantee of due process, which is said to include the presumption of innocence; and 3) the sixth amendment's guarantee of assistance of counsel to an accused.[214] It is therefore necessary to examine the validity of these allegations.

### EIGHTH AMENDMENT

The only place where bail is mentioned in the United States Constitution is in the eighth amendment. It reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Obviously, it says nothing about a right to bail. It distinguishes neither between capital and noncapital cases, nor between bail before and after conviction. Therefore, it is not possible to read into it a guarantee of a right to bail before trial in noncapital cases without doing violence to the clear language of the Constitution.

The simplest and most logical interpretation is that given by the Supreme Court in *Carlson v. Landon*,[215] namely that the eighth amendment provides "that bail shall not be excessive in those cases where it is proper to grant bail."[216] Equally logical is the conclusion that, since the Constitution does not provide for a right to bail, the intent of the framers was to leave the matter to Congress. This conclusion is strengthened by the fact that only a few days after the final passage of the Bill of Rights in Congress—on September 21, 1789—and before its final adoption, Congress passed a statute—on September 29, 1789—in which it regulated the conditions of release on bail upon arrests in criminal cases.[217]

Congress could deny rt. to bail and make 8TH Am. nugatory?

However, it has been claimed that the excessive bail clause guarantees a right to bail by necessary implication. Its purpose, it is argued, is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be met. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail, or if Congress could define away the right to bail.[218] Logical as this may sound, the reasoning fails completely when it comes to capital cases. No one has yet said that the eighth amendment prevents Congress from denying a right to bail to persons charged with a capital offense. No one has yet claimed that the statute in which Congress did exactly that is unconstitutional. There is nothing whatsoever in the text of the eighth amendment which implies an exception in capital cases.

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[213] Dr. Meyer discusses due process of law in part II of this article which will be published in Volume 60, Issue 6 of the *Georgetown Law Journal*.

[214] *1970 Preventive Detention Hearings* 5-7 (Senator Ervin's opening statement).

[215] 342 U.S. 524 (1952).

[216] *Id.* at 545.

[217] Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91, *as amended*, 18 U.S.C. § 3141 (1970); *see* note 141 *supra* and accompanying text.

Even Professor Caleb Foote, who was anxious to establish a constitutional right to bail, rejected the theory that the excessive bail clause implies such a right.[219] Professor Foote declared it to be his thesis that the particular form in which the bail question appears in the Constitution is the result of an historical accident, and that the most plausible resolution of this "constitutional riddle" is to find an intention to grant such a right.[220] He found no direct evidence of such an intent, but he tried to deduce it from the circumstances surrounding the adoption of the eighth amendment. His conclusion was that the excessive bail clause was meant to provide a constitutional right to bail and that the inadequacy of the form adopted for this purpose was due to a "defect" in the treatment of bail in the Virginia Declaration of Rights caused by nonlawyer Mason's unfamiliarity with technical legal language.[221] Thereafter, Mason's mistake "was carried forward with so little discussion that the latent ambiguity was never noticed."[222]

Such an explanation is not very plausible in view of the history of the excessive bail clause, the bail laws of the first thirteen states, and their proposals for the Federal Bill of Rights.[223] However, Professor Foote's article has been widely quoted, and great reliance has been placed on his conclusions. It is therefore necessary to treat them in some detail, especially since some of these conclusions are based on a wrong premise.

*History of Excessive Bail Clause.* Professor Foote correctly traced the events in English history which led to the excessive bail clause, from *Darnel's* case in 1627[224] to the Petition of Right in 1628,[225] the Habeas Corpus Act of 1679[226] and the Bill of Rights of 1689.[227] But because of his preoccupation with bail he missed the fundamental issue of the fight which brought about this development.

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[218] Carlson v. Landon, 342 U.S. 524, 569 (1952) (Burton, J., dissenting); United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926) (dictum).

[219]
> One problem with this approach is that the precise scope of the "right" is undefined . . . . Much more difficult is the obvious objection that if the founders intended by the Eighth Amendment to establish the right to bail in all or most cases, why did they not say so directly instead of clothing their purpose in ambiguity? They had ample colonial precedents for a forthright declaration of a right to bail. . . .

Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 970 (1965).

[220] *Id.* at 965.

[221] *Id.* at 986-87.

[222] *Id.* at 986.

[223] *See* notes 288-312 *infra* and accompanying text.

*Darnel's* case involved five Knights who had been imprisoned by Charles I for having refused a loan to the King. Darnel moved the justices of the King's Bench to grant him a writ of habeas corpus directing the prison warden to show the cause of his imprisonment. The warden's return merely recited that Darnel "was and is committed by the special command of his majesty."

Darnel's case

According to Professor Foote, Serjeant Bramston opened for his client[228] by stating "it is his petition, that he may be bailed from his imprisonment . . . for it being before trial and conviction had by law, it is but an accusation, and he that is only accused ought by law to be let to bail." Again according to Professor Foote, the Attorney General argued that the version of chapter 39 of the Magna Carta, enacted in 1354,[229] upon which the petitioners relied, did not apply to pretrial imprisonment; that it was his position that only imprisonment pursuant to "final prosecution" must be "by due process of law" and that the pretrial period "is not within the meaning of the statute."[230] Then Professor Foote explained that when the judges proved their subservience to the King by denying release, the case was taken up in Commons early the following year, and it was against this background that the Petition of Rights was adopted.[231]

He went on to say that the English structure protecting the right to bail stands like a "three-legged stool" representing its three essential elements—first, the determination of whether a defendant has a right to release on bail, answered by the Petition of Right of 1628, by a long line of statutes which spelled out which cases must and must not be bailed by justices of the peace or—in the early period—by sheriffs, and by the discretionary power of the judges of the King's bench to bail any case not bailable by the lower judiciary;[232] second, by the habeas

tripartite protection:
① when bail allowed by st.
② habeas corpus to redress above
③ no excessive bail

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[224] 3 T. HOWELL, STATE TRIALS 1 (1809) [hereinafter cited as HOWELL.].

[225] 3 Car. 1, c. 1 (1628).

[226] 31 Car. 2, c. 2 (1679).

[227] 1 W. & M., c. 2 (1689).

[228] This argument was on behalf of John Heveningham, one of the five Knights, but the issues were the same in all the cases. 3 HOWELL 6.

[229] "That no man . . . shall be . . . taken nor imprisoned . . . without being brought in answer by due process of the law." 28 Edw. 3, c. 3 (1354).

[230] 3 HOWELL 39.

[231] Foote, *supra* note 219, at 959.

[232] This is only partly correct. The High Court judges had also full discretionary power to refuse release on bail in cases which justices of the peace would have had to

corpus procedure "which was developed to convert into reality rights derived from legislation which could otherwise be thwarted;" and third, by the excessive bail clause of the Bill of Rights of 1689 to protect against judicial abuse. When the Americans converted their English statutory legacy into constitutional dogma, they unaccountably left off one of the legs, and this, according to Professor Foote, is the heart of the constitutional problem.[233]

This argument makes it appear as if the Petition of Right of 1628 embodied the right to release on bail.[234] However, bail was not even mentioned in the Petition of Right of 1628. As Professor Foote stated, the Petition of Right of 1628 was adopted against the background of *Darnel*'s case. But Professor Foote has misunderstood that case. The primary issue in that case was not the right to bail, but the discretionary power of the crown to imprison its subjects without notice of the cause.[235]

It is true that Sergeant Bramston petitioned for bail on behalf of his clients. This seemed to be customary in cases committed by the command of the King since the judges would not set such prisoners free.[236] But the essence of counsel's argument was not addressed to the right to release on bail. It was directed against the return of the Warden which, Serjeant Bramston claimed, was not good because it showed no sufficient cause of the commitment. As stated, the cause of the imprisonment was by special mandate of the King, but this, Bramston argued, was too general and uncertain, "for that it is not manifest what

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admit to bail. A person committed by justices of a higher jurisdiction could not be bailed by justices of the peace even though the matter might be within their cognizance. 2 M. HALE, HISTORY OF PLEAS OF THE CROWN 132-34 (1847). For instance, in *Jenkes'* case in 1776, Jenkes had been committed by the King's Council. Jenkes' counsel insisted that the offense for which his client was committed was bailable. He moved the Lord Chancellor for a writ of habeas corpus, but without success. He then applied to the quarter-session held for the liberty at Westminster. That court refused because "[h]e is committed by a superior court, and we, who are an inferior one, cannot bail him." 6 HOWELL 1195-98. Jenkes' counsel then applied to the Lord Chancellor to be released on *mainprise*, but this too was refused. Finally, the King himself gave permission for release. *Id.* at 1206-07.

[233] Foote, *supra* note 219, at 968.

[234] Professor Foote alleges this repeatedly. *Id.* at 974 ("That power [of the justices of the peace to bail] was settled by the Petition of Right of 1628."); *id.* at 973 (the detailed pattern of the English bail statutes "was reinforced by the Petition of Right, the Habeas Corpus Act and the excessive bail clause of the 1689 Bill of Rights."); *see* 3 Car. 1, c. 1 (1628).

[235] *Cf.* 6 HOLDSWORTH 32-40.

[236] "[I]t hath always been the discretion of the Judges, to give so much respect to a commitment by the command of the King or the privy-council . . . that they will not presently set them free, but bail them to answer what shall be objected against them on his majesty's behalf. . . ." 3 HOWELL 154.

kind of command this was."[237] He contended that the writ of habeas corpus was the only available remedy in such a case. Its purpose was "to return the cause of the imprisonment, that it may be examined in this court, whether the parties ought to be discharged or not: but this cannot be done upon this return. . . ."[238] It may be objected, Serjeant Bramston said, that the writ of habeas corpus does not require a showing of why a person was committed to prison but merely the fact of detention. But this is no answer, "for the reason why the cause is to be returned, is for the subject's liberty."[239] The court must decide whether there was a sufficient cause for the commitment, in which case it would have to remand the prisoner. If the cause is found to be insufficient, the prisoner would have to be released. Then he objected that the return did not show the time of the commitment–meaning before or after conviction. In some cases, he argued the time is not material, and it is enough to show the cause without the time, for instance after there had been a trial and a conviction. However, here "it is but an accusation, and he that is only accused (not convicted) ought by law to be let to bail."[240] He added: "I will not dispute whether or not a man may be imprisoned before he be convicted according to the law; but if this return shall be good, then this imprisonment shall not continue on for a time, but for ever . . . and by law, there can be no remedy for the subject."[241] Therefore, he said, this return is incompatible with Magna Carta and the statute 28 Edw. 3 c. 3.

That statute provided that no man shall be imprisoned "without being brought to answer by due process of law."[242] The right to answer meant, of course, the right to answer to the charges and, in case of denial or plea of not guilty, to a proof proceeding. The meaning of Serjeant Bramston's argument was that it was impossible to answer to charges which were not known, and thus a person imprisoned without any cause shown could not have the benefit of the law which guaranteed the right to answer and, in case of a denial, a trial.

The Attorney General also relied on arguments based on statutes and precedents. He remained the judge that "the King is the head of the same fountain of justice, which your lordship administers to all his subjects; all justice is derived from him, and what he doth, he doth not as a private person, but as the head of the common wealth, as justiciarius regni . . . ."[243] In other words, the King's absolute power was part of the law and his power to commit by special command and without cause shown was part of due process. "And, my lord," said the Attorney General, "unless the Return to you doth open the secrets of the commitment, your lordship cannot judge whether the party ought by law to be remanded, or delivered."[244] Where the cause is shown, the court, if it has jurisdiction, can properly try the matter. But where no cause is shown, it is intended to be a "matter of state" and "not ripe" for trial.[245] Referring to the statute on which the prisoners' counsel relied that no man shall be imprisoned "without being brought to answer by due process of law," the Attorney General argued, that the statute only applied where the case was ready to go to trial because the cause was known; and if the prisoner were kept in prison and never brought to answer, that would be without due process and forbidden by the statute; "but when a man is taken in causes that are unknown to us . . . we are not privy to the circumstances which may cause the trial to be delayed; and peradventure it is not time to bring the matter to trial, because it is not yet come to maturity, and therefore this is not within the meaning of the statute."[246]

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[237] *Id.* at 6.

[238] *Id.*

[239] *Id.* at 7.

[240] *Id.* Convicted persons could not be bailed. 31 Car. 2, c. 2 (1679).

[241] 3 HOWELL 8.

[242] 28 Edw. 3, c. 3 (1354).

Again, clearly, it is not pretrial release on bail which was in issue, but the defendant's right to know the cause of his imprisonment so that he may be able to answer and have his trial.

The court considered the precedents and concluded that the King had the power to commit, and that the court could not grant bail in such a case. If a definite cause were assigned, it could judge of its sufficiency, but if no cause were given, it could not question the legality of a commitment by the King.[247]

This case led to proceedings in Parliament and, as already mentioned, to the Petition of Right.[248] That document lists a number of grievances, the first one among them being the one of interest here. It states that contrary to a statute that no person shall be compelled to make any loans to the King against his will, nor be charged with other specified charges, people have been required to lend certain sums of money to the King, and upon refusal to do so, some have had an oath administered to them contrary to law and have been constrained to appear before the privy council, and other places. Others have been imprisoned, and divers other charges have been levied on them. And whereas by the great Charter it is enacted that no freeman be imprisoned but "by the law of the land," and in 28 Edw. 3, section 3 it was declared that no man should be imprisoned "without being brought to answer by due process of law," they have nevertheless been imprisoned without any cause shown. And when they were brought before the justices by the King's writs of habeas corpus, and their keepers commanded to certify the causes of their detainers, "no cause was certified, but that they were detained by your majesty's special command, signified by the lords of your privy-council, and yet were returned back to several prisons without being charged with anything to which they might make answer according to law."[249] Therefore the petitioners prayed:

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[243] 3 HOWELL 37.

[244] *Id.*

[245] *Id.*

[246] *Id.* at 39.

[247] *Id.* at 53, 58. *See also* 6 HOLDSWORTH 36.

[248] 3 Car. 1, c. 1 (1628). *See also* 3 HOWELL 221-24.

> 1. That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament; 2. and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof; 3. and that no freeman in any such manner as is before mentioned, be imprisoned or detained.[250]

The King first tried to find a form of assent which would have preserved his discretionary power,[251] but he finally agreed to comply with the request to give a "clear and satisfactory answer," which was, "*Soit droit fait come il est desiré par le Petition.*"[252]

The next important event in the developments which led to the excessive bail clause was the Habeas Corpus Act of 1679.[253] In order to appreciate fully why the excessive bail clause was of such importance as to be included in the Bill of Rights of 1689,[254] it is necessary to know something about the use of the writ of habeas corpus by the common law courts in their fight for supremacy.

The writ of habeas corpus *ad respondendum* was originally one of the steps which could be taken in the *mesne* process in civil cases to secure the appearance of a defendant.[255] Only slowly did it develop into the writ of habeas corpus *ad subjiciendum*, by which an official or a private person could be ordered to produce a person in his custody. The cause of this development in England is attributed to the endeavor of the common law courts to extend their jurisdiction at the expense of rival courts.[256]

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[249] 3 Car. 1, c. 1, cl. 1-5 (1628).

[250] *Id.* cl. 10.

[251] 3 Howell 224. "The King willeth that right be done according to the law and custom of the realm."

[252] *Id.* at 230.

[253] 31 Car. 2, c. 2 (1679).

[254] 1 W. & M., c. 2 (1689).

[255] *See* 9 Holdsworth 108.

Like other royal courts, the Court of Common Pleas and the Court of the King's Bench had emanated out of the Curia Regis in a process of differentiation.[257] They were originally courts of limited jurisdiction which had to follow a certain restricted formulary procedure: they were only permitted to receive cases as they had general warrants or were given specific writs, and they had to make proof by jury inquests.[258] From here took place the development of the common law of England,[259] but at no time has the common law been the only law of England.

The King and his Council, of course, did not become limited to the use of the common law procedure. The Council remained a body of indefinite power, and it was its recognized right to assent to new procedural forms.[260]

After 1300, the ecclesiastical law began to appear in the King's Council. Its simple and effective procedure was used to deal with petitions of people seeking relief in cases in which the common law courts failed to provide a remedy because at an early date their procedure had become rigid and costly.[261] It became the custom of the Council to delegate civil matters to the Chancellor, while it continued to deal with petitions raising questions of public order and of a criminal character. At that time the Council's favorite meeting place in Westminster was a room called *chambre estoillee* or *cambre des estoilles*, or Latin *camera stellata*, that is Star Chamber, because its ceiling was decorated with stars. This part of the Council later developed into the Court of the Star Chamber.[262] The chancery of the Council eventually became the Court of Chancery with a wide range of jurisdiction and a procedure largely shaped by the ecclesiastic law.[263]

Towards the end of the 16th century began a rivalry between the courts of common law and the Court of Chancery and almost immediately the common law courts began to use the writ of habeas corpus to assert their jurisdiction by releasing persons committed by the Chancellor as well by other royal courts such as by the Court of

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[256] *Id.* at 109.

[257] *See* J. BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 4 (1913) [hereinafter cited as BALDWIN].

[258] *Id.* at 48-50, 64.

[259] 1 HOLDSWORTH 53.

[260] BALDWIN 64-65, 262; 1 HOLDSWORTH 485.

[261] BALDWIN 265-66, 271, 280; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 29, 177-79 (5th ed. 1956).

[262] BALDWIN 356.

[263] C. LANGDELL, A SUMMARY OF EQUITY PLEADING ¶ 46 (2d ed. 1883).

Requests, by the Admiralty, and by the Court of High Commission. Under the leadership of Lord Coke, the common law courts entered into a contest for supremacy with these other royal courts[264] and even with the King's Council.

When the common law courts began to use the writ of habeas corpus *ad subjiciendum et recipiendum* to release persons committed by the King's Council, litigants began to connect it with the clause of the Magna Carta[265] which prohibited imprisonment without due process of law, although there was no historical connection between the two.[266] But now the connection was made with the attempts of the House of Commons during the medieval period to interpret "due process of law" to mean due process of the common law,[267] and Magna Carta and later statutes reaffirming it were used to "prove" that arrests by order of the King's Council were illegal.[268] This interpretation was never acquiesced in by the crown, and medieval protests and legislation never succeeded in limiting the extensive power of the King or his Council to make arrests.[269] Nor did the King's Council acquiesce in the deliverance of its prisoners by writs of habeas corpus. Thus, when Darnel asserted that the writ of habeas corpus was the right remedy for him, the court decided that this was not the law. However, that decision was declared not to be law by the Petition of Right and by its forced acceptance by the King. But even thereafter, the powers of the King to commit his subjects to prison and to keep them there were very large. As long as he had a court like the Court of the Star Chamber on which he could count, the Petition of Right could be evaded. It was treated as nonexistent whenever it suited the policy of the crown. The King and the crown lawyers took the position that it merely confirmed the old law and enacted nothing new and therefore it could be disregarded.[270]

In 1641, the Long Parliament which initiated the Cromwell Revolution passed an Act to abolish the Court of the Star Chamber.[271] The same Act provided that if any person should be imprisoned by any court exercising a jurisdiction similar to that of the Star Chamber, or by the command of the King or of the Council, he should, on motion made to the judges of the Court of King's Bench or Common Pleas, have a writ of habeas corpus upon payment of the ordinary fees; that the jailer, upon payment of the charge for returning the prisoner if he should be remanded, should bring him before the judges of the court from which the writ issued with a certificate of the true cause of his imprisonment; and that the court should, within three court days after such return, examine the return, "and shall thereupon do what to justice shall appertain, either by delivering, bailing or remanding the prisoner." [272]

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[264] 9 HOLDSWORTH 110-11.

[265] *See* 28 Edw. 3, c. 3 (1354) (confirming Magna Carta).

[266] 9 HOLDSWORTH 111-12.

[267] 1 HOLDSWORTH 487; 9 HOLDSWORTH 112.

[268] 9 HOLDSWORTH 112.

[269] 1 HOLDSWORTH 488-89; 9 HOLDSWORTH 112.

[270] 6 HOLDSWORTH 39.

[271] 16 Car. 1, c. 10 (1640).

After the Restoration, the Stuarts found indirect ways to imprison persons they objected to for considerable periods by making use of some defects of the Act.[273] Thus it was not certain which courts had power to issue the different forms of the writ and whether they could issue it in vacation as well as in term time. And if the writ was issued, the jailer would wait for an *alias* or *pluries* writ, move the prisoner about to evade service of these writs, and, as a last resort, remove him out of the jurisdiction of the court.[274]

In order to remedy these defects the Habeas Corpus Act of 1679 was enacted.[275] It stated in the preamble that the sheriffs and others "to whose custody any of the King's subjects have been committed for criminal or supposed criminal matters," have greatly delayed returns of writs of habeas corpus so that an *alias* and *pluries* habeas corpus had to be obtained, and sometimes more, and that "shifts" [276] were used to avoid obedience to the writ, "whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable." [277] To prevent such abuses, the Act provided that the lord chancellor and any of the judges of the superior courts must issue the writ in vacation or in term, unless the commitment was for treason or felony, plainly and specially expressed in the warrant of commitment, or the prisoner was detained on conviction for crime, or by some legal process for such matters or offenses for which by the law the prisoner is not bailable. The time was specified within which the return of the writ must be made and within which the court must adjudicate on the writ. Prisoners indicted for treason or felony must be tried at the next sessions or must be admitted to bail, unless the witnesses for the King could not be produced; if not indicted and tried the second term after the commitment, the prisoner must be discharged.[278] No person could change the place of confinement of a prisoner except in certain specified cases.

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[272] *Id.*

[273] 9 HOLDSWORTH 115.

[274] *Id.* at 116.

[275] 31 Car. 2, c. 2 (1679).

[276] In 1667 Clarendon was accused of sending persons to "remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law. . . ." 6 HOWELL 330; *see* 9 HOLDSWORTH 116.

[277] 31 Car. 2, c. 2, § 1 (1679).

The Act had obvious defects. It was made inapplicable to civil imprisonment by its provision "[t]hat nothing in this Act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause." [279] Furthermore, the remedy authorized by the Act was to discharge from imprisonment persons charged with minor offenses "taking his or their recognizance, with one or more surety or sureties, in any sum according to their [the judicial officers'] discretions, having regard to the quality of the prisoner and nature of the offense, for his or their appearance in the Court of the King's Bench the term following. . . ." or in some other court.[280] Thus, the Act conferred no power to discharge a prisoner absolutely, except when he was not indicted and tried within the prescribed period. In all other cases he was required to be remanded or admitted to bail.[281]

An act which mainly conferred a power to discharge on bail could easily be obstructed merely by imposing excessive bail which the prisoner was unable to raise. This obviously is what happened,[282] for in clause 10 of the preamble to the Bill of Rights[283] it was complained that excessive bail had been required of persons committed in criminal cases "to elude the benefit of the laws made for the liberty of the subject." This complaint referred to the Habeas Corpus Act, enacted only 10 years before, which was entitled "An act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas." [284] The Habeas Corpus Act did not give a right to bail. It merely enabled a prisoner before conviction, except one committed for treason or felony, to secure an early appearance before the Chancellor or a judge and a discharge upon bail if the return showed that by the law he was bailable. By imposing excessive bail, the judges had made the Habeas Corpus Act inoperative with respect to those prisoners whom the King did not want to release. The answer was part of clause 10 of the Bill of Rights of 1689—"[t]hat excessive bail ought not be required."[285]

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[278] *Id.* § 7.

[279] *Id.* § 8. In 1816 the Act was extended to imprisonment on other than criminal charges, unless for debt or on process in a civil suit. 56 Geo. 3, c. 100 (1816); *see* note 287 *infra.*

[280] 31 Car. 2, c. 2, § 3 (1679).

[281] R. HURD, HABEAS CORPUS 417 (1858).

[282] 9 HOLDSWORTH 118-19.

[283] 1 W. & M., c. 2 (1689).

[284] 31 Car. 2, c. 2 (1679). *See also* 9 HOLDSWORTH 118-19. The statutes regulating bail were not so inscribed. It must be borne in mind that neither in England nor in the colonies was the bail system conceived to secure the liberty of the individual.

Thus there was a direct connection between the Petition of Right of 1628 which prohibited arrests without notification of the cause, with the Habeas Corpus Act of 1679 which was to insure speedy judicial review of the causes of arrests, and the excessive bail clause of the Bill of Rights of 1689 which was to prevent obstruction of the Habeas Corpus Act. The men who made the United States Constitution were familiar with English law and English legal history.[286] Therefore it is no accident that all three of those connecting points have been embodied in the Constitution—1) the "right to be informed of the nature and cause of the accusation" in the sixth amendment; 2) the part of the Habeas Corpus Act concerning judicial review of the legality of the confinement in article one, section nine, and the part concerning the right to a speedy trial in the sixth amendment; and 3) the excessive bail clause to prevent obstruction of the Habeas Corpus Act in the eighth amendment.[287]

*Constitutions of the Original States and Their Proposed Amendments to the United States Constitution.* The complete absence of any language providing for a right to bail in the United States Constitution is evidence in itself that no such constitutional right was intended. In addition, the legal development in the colonies and the events preceding the enactment of the first ten amendments make it clear that the framers of the Constitution had no intention of creating on the federal level an inflexible constitutional right to bail.

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[285] 1 W. & M., c. 2 (1689).

[286] *See* THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 477 (Oxford ed. 1920) (debates in Constitutional Convention concerning habeas corpus and its connection to bail).

[287] A visible sign of the connection between the Habeas Corpus Act and the eighth amendment still exists in Massachusetts where a statute of 1784 extended habeas corpus to arrests in civil matters.

> Whoever is imprisoned or restrained of his liberty may, as of right and of course, prosecute a writ of habeas corpus according to this chapter to obtain release from such imprisonment or restraint, if it proves to be unlawful, unless—
>
> First, He has been committed for treason or felony, or on suspicion thereof, or as accessory before the fact to a felony, and the cause has been plainly expressed in the warrant of commitment.
>
> Second, He has been convicted or is in execution upon legal process, civil or criminal.
>
> Third, He has been committed on mesne process in a civil action in which he was liable to arrest and imprisonment, unless excessive and unreasonable bail was required.

MASS. GEN. LAWS ANN. ch. 248, § 1 (1969), *amending* Act of Jan. 1784, ch. 72, [1784] Mass. Acts & Resolves 178; *cf.* Parker v. Ellis, 362 U.S. 574, 575 (1960) ("The purpose of the proceeding defined by the statute [authorizing the writ of habeas corpus to be issued] was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the petitioner or his admission to bail."). This historically sound ruling was overruled by *Carafas v. La Valee*, because, in the Court's opinion, the 1966 amendments to the federal habeas corpus statute contemplate relief other than release from physical custody. 391 U.S. 234 (1968); *see* 28 U.S.C. § 2243 (1970).

As described above, some colonies had enacted laws providing for a right to bail at an early date. The earliest were in Massachusetts in 1641,[288] Pennsylvania in 1682,[289] and New York in 1683.[290] When these three colonies became states of the new union, only Pennsylvania provided for a right to bail in its first state Constitution of 1776. It was contained in section 28 of the second part of the Constitution entitled Plan or Frame of Government . . . which re-enacted verbatim the above cited section XI of the 1682 Frame of Government.[291] Section 29 of the 1776 Constitution added an excessive bail clause which read —"Excessive bail shall not be exacted for bailable offences. And all fines shall be moderate." [292]

Neither Massachusetts nor New York provided for a right to bail in their Constitutions, but Massachusetts included an excessive bail clause in part one, article XXVI of its Constitution of 1780,[293] while New York waited until 1846 to include an excessive bail clause in article one, section five in its Constitution. But both states, New York and Massachusetts, left the right to bail to statutory and case law and never included it in their Constitutions.[294]

Of those states which adopted constitutions before the enactment of the Bill of Rights in 1789, only Pennsylvania and North Carolina included a provision regulating a right to bail for noncapital offenses in their Constitutions. The 1776 Constitution of North Carolina, like that of Pennsylvania, contained both a provision regulating a right to bail[295] and an excessive bail clause.[296]

When the Federal Convention of 1787 failed to include a bill of rights in the new Federal Constitution, there were immediate proposals for amendments. Already on September 26, 1787, Richard Henry Lee had moved a bill of rights and a long list of amendments in the Continental Congress. They were not considered and later expunged from the record.[297] Lee's proposed bill of rights contained the provision "[t]hat excessive Bail, excessive fines, or cruel and unusual punishments not be demanded or inflicted," but no provision concerning a right to bail.[298]

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[288] *See* note 132 *supra* and accompanying text.

[289] *See* note 135 *supra* and accompanying text.

[290] *See* note 136 *supra* and accompanying text.

[291] 5 THORPE 3089.

[292] *Id.*

[293] 3 THORPE 1892.

[294] N.Y. CIV. PRAC. LAW § 6115 (McKinney 1963); N.Y. CODE CRIM. PRO. § 554 (McKinney 1958). *See also* Commonwealth v. Baker, 343 Mass. 162, 177 N.E.2d 783 (1961).

[295] The North Carolina Constitution of 1776 provided: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great." N.C. CONST. art. XXXIX (1776), *reprinted in* 5 THORPE 2793.

[296] "[E]xcessive bail should not be required, nor excessive fines imposed nor cruel or unusual punishments inflicted." N.C. CONST. art. X (1776), *reprinted in* 5 THORPE 2788.

At the Pennsylvania ratifying convention of 1787, an articulate minority objected strongly to the proposed federal constitution because it gave too much power to all branches of the central government without providing for a bill of rights which would limit such extensive powers and protect the rights of the people.[299] They presented fifteen amendments, but were voted down. They continued the fight,[300] and their proposals were among the earliest to come to public attention.[301] These proposals contained the substance of the ten amendments later added to the United States Constitution. Section four of these proposed amendments provided, "[t]hat excessive bail may not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."[302] There was no clause providing for a right to bail in the proposed amendments. During a long and articulate fight in Pennsylvania for a federal bill of rights it was never suggested that the Federal Constitution should contain a clause providing for a right to bail. Yet Pennsylvania continued to provide for such a clause in its successive constitutions.[303]

North Carolina also made proposals for a federal bill of rights.[304] Like Pennsylvania, the 1776 Constitution of North Carolina contained both a right to bail as well as a prohibition of excessive bail. But also like Pennsylvania, North Carolina proposed only the inclusion of the excessive bail clause for the federal bill of rights, but not of a right to bail.[305]

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[297] J. MCMASTER & F. STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 2 (1888) [hereinafter cited as MCMASTER & STONE].

[298] 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 648 (Burnett ed. 1936).

[299] MCMASTER & STONE 464-82.

[300] *Id.* at 454-83, 559-64.

[301] E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 11 (1957) [hereinafter cited as DUMBAULD].

[302] *Id.* at 173.

[303] PA. CONST. art. I, §§ 13-14; PA. CONST. art. IX, §§ 13-14 (1838), *reprinted in* 5 THORPE 3114; PA. CONST. art. IX, §§ 13-14 (1790), *reprinted in* 5 THORPE 3101; PA. CONST. §§ 28-29 (1776), *reprinted in* 5 THORPE 3089.

[304] DUMBAULD 200.

[305] In 1868 North Carolina eliminated the right to bail from its Constitution. The Constitution of 1868 contained the historical English connection between the Petition of Right, the Habeas Corpus Act, and the excessive bail clause of the Bill of Rights of 1689. 2 THORPE 2801-02. North Carolina's Constitution of 1876 made no changes in

Altogether, eight states submitted amendment proposals[306]—Pennsylvania, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, and North Carolina. Four of them, Pennsylvania, Virginia, New York, and North Carolina, proposed a clause containing a prohibition of excessive bail, excessive fines and cruel and unusual punishments which became the eighth amendment. Not one of the eight states proposed the inclusion of a provision regulating the right to bail. Such a demand was also absent from the suggestions of Thomas Jefferson. He wanted a bill of rights, and in his letter of July 31, 1788, to James Madison[307] he told him what it should contain. He did not suggest a right to bail. In a letter of August 29, 1789,[308] he acknowledged the receipt of the declaration of rights which Madison sent him. He urged a few alterations, but said nothing about a right to bail.

Of particularly persuasive evidence are the developments in Virginia because many of its statesmen were influential in the formulation of the Constitution, and many of the clauses of the Virginia Declaration of Rights became a model for the Federal Bill of Rights. For example, section nine of Virginia's Constitution of 1776 became the eighth amendment.[309] To this day Virginia has retained the prohibition of excessive bail as a constitutional provision. Apparently to make it clear that the constitutional excessive bail clause did not grant any right to bail by implication, the Constitution of Virginia of 1902 added section 109 which provided that the General Assembly shall provide by whom, and in what manner, applications for bail shall be heard and determined. This clause is still in effect.

Virginia acted quite differently with respect to a right to bail. This never has been a constitutional right, but has been left to statutory regulation. The first such statute was passed on December 5, 1785,[310] before the adoption of the United States Constitution and of the Federal Bill of Rights. It provided that those were to be admitted to bail who were apprehended for any crime not punishable in life or limb. Even in cases punishable in life or limb, a party could be admitted to bail if there was only a light suspicion of guilt. But if the crime was punishable in life or limb, or if it was manslaughter, and there was good cause to believe the party guilty, he could not be admitted to bail. After conviction no bail would be allowed.

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this respect. *Id.* at 2823-24. The right to bail was left to statutory regulation. N.C. GEN. STAT. §§ 1-409 to 39, 15-102 to 09 (1969).

[306] *See* DUMBAULD 173-205 (1957).

[307] 13 THE PAPERS OF THOMAS JEFFERSON 440-43 (J. Boyd ed. 1956).

[308] 15 *id.* at 364, 368.

[309] *Compare* U.S. CONST. amend. VIII *with* VA. CONST. § 9 (1776).

[310] VA. COMPILED LAWS, c. XIV, 1 REV. CODE OF 1803, at 25 (2d ed. 1814).

On December 15, 1796, Virginia passed a new penal statute which drastically reduced the crimes punishable by death to murder in the first degree.[311] This part of the statute went into effect on March 25, 1800. On January 23, 1801, Virginia amended its bail act and provided "that no person shall hereafter be bailable for any offence which, on the 25th day of March, in the year 1800, was punishable in life, or limb . . . ." unless there is only a slight suspicion of guilt.[312] In spite of changing attitudes with respect to the death penalty, Virginia was nevertheless unwilling to deprive courts of the discretionary power to deny release on bail to persons who were arrested under grave suspicion of having committed a serious crime, and who might be dangerous if released. The conviction that an inflexible constitutional regulation of a right to bail was not desirable, neither for the state nor for the Federal Constitution, must have motivated the statesmen from Virginia when they formulated their proposals for the amendments to the United States Constitution.

In 1789, Congress followed the example of Virginia. It enacted a statutory regulation of a federal right to bail, but refrained from including it in the Constitution. Thus it reserved for Congress the right to make legislative changes whenever required by changed circumstances. It is thus clear from the above described events that neither on the part of the original states nor on the part of Congress was there any intention of providing for a right to bail in the United States Constitution.

*(Part II of this article will be published in Issue VI of Volume 60.)*

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[311] *Id.* c. CCII, 1 REV. CODE OF 1803, at 511.

[312] *Id.* c. CCLXXI, 1 REV. CODE OF 1803, at 580.

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## CONSTITUTIONALITY OF PRETRIAL DETENTION

By **Hermine Herta Meyer**

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# CONSTITUTIONALITY OF PRETRIAL DETENTION

HERMINE HERTA MEYER*

*In part two of a two-part article examining the constitutionality of the pretrial detention provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Dr. Meyer discusses the role of the fifth and fourteenth amendments upon this issue. Tracing the historical development of the concept of due process both in England and the United States, Dr. Meyer concludes that the due process clauses of the fifth and fourteenth amendments properly apply to procedural safeguards only and that the recent expansive interpretation of due process to embrace substantive rights is unwarranted. Dr. Meyer also considers arguments that pretrial detention runs afoul of equal protection and the so-called presumption of innocence accorded a criminally accused individual. In an Appendix the author examines the bail provisions of several European countries. In part one of her article, appearing in Issue V of the* Georgetown Law Journal, *Dr. Meyer examined the historical origins of bail, its development in English law, its subsequent introduction into American law in the colonial period, and into the Constitution.*

## CONSTITUTIONAL ISSUES

### DUE PROCESS OF LAW

In order to be able to determine whether there is any justification for the claim that pretrial detention violates "due process of law," it is necessary to examine what this constitutional provision really means. In *Jenkins v. McKeithen*,[1] Mr. Justice Marshall quoted from the Court's opinion rendered by Chief Justice Warren in *Hannah v. Larche* the following words concerning due process: "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."[2] In these two cases the Supreme Court dealt with due process in an elusive manner indeed, because it applied two different standards of due process to two almost identical proceedings.

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[*] Attorney, Office of the Deputy Attorney General, U.S. Department of Justice. Formerly Legal Adviser to the Embassy of Switzerland. Member of the Bar of New York, of the District of Columbia and of the United States Supreme Court. LL.B., New York University. Dr. jur. (doctor uturiusque juris) University of Zurich, Switzerland. The views expressed in this article are those of the author and do not necessarily reflect the position of the Department of Justice.

[1] 395 U.S. 411, 426 (1969).

[2] 363 U.S. 420, 442 (1960).

*Hannah v. Larche* concerned an attack on the constitutionality of the investigative proceedings of the Civil Rights Commission. The complainants were registrars of voters in Louisiana. They contended, in substance, that the Commission was investigating criminal charges made against them, namely alleged deprivation of Negro voting rights, and that the procedural rules governing the Commission's investigation denied them their constitutional right of being informed of the specific charges, and their rights of confrontation, cross-examination, and full representation by counsel.[3]

Chief Justice Warren, speaking for the Supreme Court, pointed out that the Commission's only purpose was to find facts which might subsequently be used as the basis for legislative or executive action, but that it did not adjudicate.[4] The Court stated the constitutional question involved as follows:

> The specific constitutional question, therefore, is whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identity of the complainants, and to have the right to cross-examine those complainants and other witnesses.[5]

The Supreme Court held that such rights are not constitutionally required in investigative proceedings.[6] It went on to say:

> The investigating process could be completely disrupted if investigative hearings were transformed into trial-like proceedings. . . . Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. . . .
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> . . . .
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> Far from being unique, the Rules of Procedure adopted by the Commission are similar to those which . . . have traditionally governed the proceedings of the vast majority of governmental investigating agencies.[7]

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[3] *Id.* at 421-22, 440 n.16.

[4] *Id.* at 441.

[5] *Id.* at 441-42.

[6] *Id.* at 442.

[7] *Id.* at 443-44. The Court printed a compilation of the rules of procedure governing the investigative proceedings of a representative group of administrative and executive agencies, presidential commissions, and congressional committees in an Appendix covering 31 pages. *Id.* at 454-85.

*Jenkins v. McKeithen* concerned an attack by a member of a labor union on the constitutionality of a 1967 Louisiana statute[8] which created the Labor-Management Commission of Inquiry for the purpose of investigation and finding facts relating to violations of criminal laws in connection with labor-management relations. The proceedings provided for in the Act were almost identical with those of the Civil Rights Commission under attack in *Hannah v. Larche.*

On the strength of *Hannah*, a three judge court held that the Louisiana Act was constitutional.[9] The court said:

> The Act here in question was obviously carefully drafted with *Hannah* in mind. Its provisions are carefully tailored along the lines of the statute creating the Commission on Civil Rights . . . which was at issue in *Hannah*, and we conclude that the holding there is completely dispositive of the constitutional question here involved.[10]

Nevertheless, the Supreme Court reversed.[11] It did not overrule *Hannah;* on the contrary, it expressly reaffirmed its decision in that case.[12] To justify such inconsistency, the Court attempted to distinguish *Jenkins* from *Hannah.* In spite of the clear language of the Louisiana statute that "the Commission shall have no authority to and it shall make no binding adjudication . . . ," [13] the Court declared that "the Act, when analyzed in light of the allegations of the complaint, makes it clear that the Commission exercises a function very much akin to making an official adjudication of criminal culpability." [14] The Court indicated that if the Louisiana Commission "is designed to and does indeed act in the manner alleged" in appellant's complaint, then it might fail to meet the requirements of due process.[15] As Justice Harlan remarked in his dissenting opinion, Mr. Justice Marshall's discussion of the constitutional issues "leaves radiations which are, at least, unclear," because the Court's opinion did not directly say that any of the Commission's procedures were unconstitutional.[16] If it had, then this would have cast a broad shadow of doubt over the propriety of long standing procedures of many state and federal agencies.

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[8] LA. REV. STAT. § 23:880 (Supp. 1972).

[9] Jenkins v. McKeithen, 286 F. Supp. 537, 538 (E.D. La. 1968).

[10] *Id.* at 540; *see* 42 U.S.C. §§ 1975-1975e (1970).

[11] Jenkins v. McKeithen, 395 U.S. 411 (1969).

[12] *Id.* at 427.

[13] LA. REV. STAT. § 23:880.7(A) (Supp. 1972).

[14] 395 U.S. at 427.

[15] *Id.* at 431.

[16] *Id.* at 438, 442-43 (Harlan, J., dissenting).

Evidently, what the Court did was to use due process as a device to declare unconstitutional or, as here, cast severe constitutional doubts on, a law it did not like.[17] Mr. Justice Black criticized this tendency sharply in his dissenting opinion in the *Winship* case.[18] He pointed out that the Supreme Court had used the notion of "natural law due process" to free itself from the limits of a written Constitution and set itself loose to declare any law unconstitutional that "shocks its conscience," deprives a person of "fundamental fairness," or violates the principles "implicit in the concept of ordered liberty." [19]

A perusal of Supreme Court cases of more recent date shows that there does not seem to be much clarity as to the meaning of due process. For instance, in *Breithaupt v. Abram*,[20] the Court said that due process is measured "by the whole community sense of decency and fairness." [21] In *Kinsella v. United States* ex rel. *Singleton*,[22] the Court said that due process has to do "with the denial of that 'fundamental fairness, shocking to the universal sense of justice,'" citing *Betts v. Brady*.[23] As the Court there said, concepts of "denial of fundamental fairness, shocking to the universal sense of justice," may vary according to the circumstances.[24] They certainly have varied among the members of the Supreme Court, as the Court itself has shown by overruling *Betts v. Brady*.[25] Does anyone still wonder why Chief Justice Warren and other members of the United States Supreme Court ended up finding the concept of due process "elusive?"

Because of this confusion, it may be helpful to trace the historical meaning of "due process of law" and, if possible, the intent of the framers when they included the clause in the United States Constitution. Such an endeavor seems to be timely, because Chief Justice Burger has promised the Nation to return to the language of the Constitution rather than to follow doubtful precedents.[26] Thus there appears to be hope that the Supreme Court, instead of being guided by such uncertainties as the "universal sense of justice" or "the whole community sense of 'decency and fairness,' " or the "shocks the conscience" test, may revert to a practice of the past and let the language of the Constitution in its historical setting be its guide.

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[17] It should be noted that Justices Black and Douglas dissented in *Hannah v. Larche*. 363 U.S. at 493 (Douglas & Black, JJ., dissenting). In *Jenkins v. McKeithen*, they reasserted their opinion that *Hannah* should be overruled. *See* 395 U.S. at 432 (Douglas & Black, JJ., concurring). It was their belief that a person under investigation for a crime may be denied the right of confrontation and cross-examination only by the grand jury. *See* 363 U.S. at 497-99 (Douglas & Black, JJ., dissenting).

[18] *In re* Winship, 397 U.S. 358, 377-86 (1970) (Black, J., dissenting).

[19] *Id.* at 381-82.

[20] 352 U.S. 432 (1957).

[21] It must be measured "by the whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process." *Id.* at 436.

[22] 361 U.S. 234 (1960).

[23] *Id.* at 246, *citing* Betts v. Brady, 316 U.S. 455, 462 (1942).

[24] 316 U.S. at 462.

[25] *See* Gideon v. Wainwright, 372 U.S. 335, 339, 345 (1963).

*The Historical Origin of Due Process.* Historically, the meaning of due process of law is neither vague nor elusive. The words *par due proces de lei,* translated "by due process of law," appeared for the first time in chapter three of King Edward III's confirmation of "the Great Charter, and the Charter of the Forest, and all other statutes before this time made and used." [27] Chapter three reads as follows: "Item, That no man of what estate and condition that he be shall be ousted from his land nor from his tenement, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought in answer by due process of law." [28]

The language of chapter three was derived from chapter 39 of the Magna Carta of 1215, which King John conceded to the Barons at Runymede. It reads in its original language:

> *Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum*

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[26] In *Coleman v. Alabama,* the Chief Justice said:

> With deference, then, I am bound to reject categorically Mr. Justice Harlan's and Mr. Justice White's thesis that what the Court said lately controls over the Constitution. While our holdings are entitled to deference I will not join in employing recent cases rather than the Constitution, to bootstrap ourselves into a result, even though I agree with the objective of having counsel at preliminary hearings. By placing a premium on "recent cases" rather than the language of the Constitution, the Court makes it dangerously simple for future Courts, using the technique of interpretation, to operate as a "continuing Constitutional convention."

399 U.S. 1, 22-23 (1970) (Burger, C.J., dissenting). A similar promise was made by the late Justice Black in his dissent in In re *Winship*—"I shall not at any time surrender my belief that that document [the Constitution] should be our guide, not our own concept of what is fair, decent and right. . . . As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges." 397 U.S. 358, 377-78 (1970) (Black, J., dissenting); *cf.* Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938).

[27] 28 Edw. 3, c. 1, 3 (1354).

[28] The original text reads: *"Itemqe nul homme de quel estate ou condition qil soit ne soit oste de terre ne de tenement ne pris nemprisone ne desherite ne mis a la mort saunz estre mesne en respons par due proces de lei."* *Id.* c. 3.

> *ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae.*[29]

Translated, this reads: "No freeman shall be taken and imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, nor will we send upon him, except by the lawful judgment of his peers and by the law of the land." It should be noted that the Latin text makes a distinction between *vel* and *aut*. *Aut* means "or," but *vel* can be translated as "or" as well as "and." In this context *vel* undoubtedly means "and," and if so translated and seen in the light of the old procedure, chapter 39 offers no particular difficulty of interpretation.[30] Its object was to compel King John to promise for the future that he would refrain from resorting to execution without a regular court procedure.[31] Consequently, no free man should be arrested and detained—that is, no one should be detained as a prisoner—without the lawful judgment of his peers and *per legem terrae*, nor ousted from his estate, nor outlawed, nor in any way destroyed, nor should the king go personally, nor send his men, to use violence against a freeman unjudged and uncondemned.[32]

*Per judicium parium*, by judgment of his peers, meant that every judgment must be rendered by the accused person's equals, not by a person of inferior rank.[33] It had nothing to do with trial by jury, since neither the word trial nor the jury as an adjudicative body—the so-called trial jury—existed at that time.[34] If at all, the famous chapter 39 of the Magna Carta may have referred to proof—not trial—by jury in the words *per legem terrae*, commonly translated as "by the law of the land."

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[29] W. McKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914) [hereinafter cited as McKECHNIE].

[30] *See id.* at 381.

[31] "The practice of granting writs of execution without trial in the courts appears to have been common, so as to have become one of the chief grievances of the baronage and commonalty against King John." M. BIGELOW, HISTORY OF PROCEDURE IN ENGLAND 155 (1880).

[32] *See* McKECHNIE 385-86. McKechnie criticizes Coke's "vicious method" of distorting the meaning of the text of the Magna Carta. *Id.*

[33] *Id.* at 377-79.

[34] References to the proof jury appear in the Magna Carta under the original name of *inquisitio* (in chapter 36: "*pro brevi inquisicionis de vita vel membris*") and *recognitio* (in chapter 18: "[*r*]*ecognitiones de nova dissaisina, de morte antecessoris, et de ultima presentacione*"). These *recognitiones* had been brought over from Normandy by Henry II. H. BRUNNER, DIE ENTSTEHUNG DER SCHWURGERICHTE 298 (1872) (The Origin of the Jury) [hereinafter cited as BRUNNER, SCHW.]; C. HASKINS, NORMAN INSTITUTIONS 200-01 (1918). They gave defendants in actions concerning land the right to apply to the King for a *recognitio* for the purpose of proving their claim. *Recognitio, recognoscere*, means the verdict of the jurors and therefore was also used as a synonym for *inquisitio*.

*Lex terrae* at that time had a technical meaning. The Norman legal sources used the expression *leges* for the modes of proof. Thus the ordeal was called *lex apparens* or *manifesta*, the compurgation oath *lex disraisinae* or *lex probabilis*, the judicial duel *lex ultrata*, proof by record, that is, by the testimony of witnesses concerning recorded transactions which they had been selected to witness, *lex recordationis*.[35] The proof procedure of these formalistic folk laws was the *lex terrae*.[36]

The party to whom proof had been awarded, usually the defendant, had to give pledge, *vadiare legem*, that he would make his law, *facere legem*, that is, go to the proof. It was very important for him to have his law, *habeat legem*.[37] Without it, he had no possibility to defend himself against an accusation. A person captured in the act or under similar circumstances could not have his law, *non habeat legem*, that is, he had no right to answer and to prove; conviction and execution immediately followed capture.[38] In all other cases it had always been the sacred right of a freeman to have his law. King John had violated this right through his writs of execution.[39] In chapter 39 of the Great Charter he was forced to promise to the freemen of England that their person and property would be protected from his arbitrary will by the rule that execution should be preceded by a judgment of equals and by the *lex terrae*. If interpreted according to its technical meaning, in criminal cases, *per legem terrae* meant by the time honored test of compurgation, battle, or ordeal.[40] The term *lex* did not merely signify a mode of proof but represented a definitive decision of the question to be proved. When proof by *inquisitio*—or jury—entered into Norman procedure, it became known as the *lex inquisitionis*. But it was usually distinguished from the *leges* of the formalistic procedures which alone formed the *lex terrae*.[41]

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[35] BRUNNER, SCHW. 177-95; MCKECHNIE 83-85; J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 200-01 (1898) [hereinafter cited as THAYER].

[36] BRUNNER, SCHW. 180, 254. *See also* THAYER 201.

[37] *See* Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139, 1146-47 (1972).

[38] *See id.* at 1148-49. *See also* Assize of Clarendon, art. 12, *reprinted in* W. STUBBS, SELECT CHARTERS 144 (2d ed. 1874) [hereinafter cited as STUBBS]. In translation, article 12 of the Assize of Clarendon provides that if any one is captured who has in his possession the fruits of robbery or theft, if he is of bad fame and has an evil testimony from the public, and has no warrant, he shall not have law. And if he shall not have been publicly denounced because of the possession which he has, he may go to the water—the ordeal of water.

[39] *See* note 31 *supra* and accompanying text.

[40] MCKECHNIE 379.

[41] BRUNNER, SCHW. 177-78, 180, 254.

Whether or not *lex terrae* as used in chapter 39 of the Magna Carta included proof by *inquisitio* has been a matter of much discussion in later centuries. In any event, in the context of chapter 39, *lex terrae* referred to proof procedure. Considering the nature of the proof proceedings at that time, Bigelow is probably correct when he says that *per legem terrae* simply required judicial proceedings according to the nature of the case.[42] These were at that time compurgation, duel, or ordeal in criminal cases; compurgation, duel, charters, witnesses, or recognition in property cases.[43]

By 1215, the date of the Magna Carta, proof by *inquisitio* or *recognitio* in certain civil actions was well established. It was expressly mentioned in chapter 18 of the Magna Carta.[44] In criminal cases, proof by *inquisitio* was not yet in use. However, its beginnings were already mentioned in chapter 36. It provided that in the future nothing shall be given or taken for a writ of inquisition of life and limbs—*pro brevi inquisicionis de vita vel membris*—but it shall be granted freely and never denied.

As Brunner showed in his fundamental work on the origin of the jury, the penetration of the proof jury into criminal procedure took place without a violent break with the principles of the old folk laws.[45] It happened by way of the exceptions.[46] The rigid folk laws permitted only one final way of proof, and therefore knew only an admission or denial of the accusation. If the accused neither admitted nor denied, but had another reason why the accuser should not prevail, an "exception" as the Romans called it, he had no way of proving it. Beginning in 1194, the *Rotuli Curiae Regis* recorded a number of cases in which the defendant pleaded an exception to the accusation and requested proof by jury inquest, either with consent of the opposing party, that is by the *jurata*, or by purchasing a writ from the King.

The writ most frequently used for this purpose was the writ *de odio et atia*.[47] For instance, a person who was appealed—privately accused—for the death of a man pleaded that the appeal had been brought out of spite and hate in order to disinherit or otherwise injure him and asked for a writ to permit him to prove this by the inquest of the jury. If the jurors' verdict confirmed the allegation of the accused, the appeal was dismissed. If the verdict did not confirm the allegation, the appeal took its course and the accused had the right to prove in accordance with the old folk laws, that is, in accordance with the *lex terrae.* The writ *de odio et atia* was the more common English name for the writ *de vita vel membris* mentioned in chapter 36 of Magna Carta.[48] To be permitted to put himself on the *patria,* the country, for his proof, that is, to prove by the inquest—jury—was a privilege for which the defendant had to purchase permission in the form of a writ of inquisition from the King. After chapter 36, proof by inquisition became a right whenever the defendant asked for it.

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[42] *See* M. BIGELOW, *supra* note 31, at 155 n.3.

[43] *Id.*

[44] *See* note 34 *supra*.

[45] BRUNNER, SCHW. 469-74.

[46] *Id.*, 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 589 n.2 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND]; THAYER 68.

[47] *See* THAYER 68 n.2.

Four years later, in 1219, the ordeals were abolished in England in compliance with a decree adopted by the Fourth Lateran Council of 1215 for the Church. In England the use of the ordeals had been especially extensive because proof by judicial combat had been unknown before the Norman conquest. Therefore, there was a need to fill the void left by the prohibition of the ordeals, and proof by the country—jury—seemed the natural replacement. But so strongly was the theory maintained that the accused was entitled to have his law, the *lex terrae,* and did not have to accept proof by witnesses, the *lex inquisitionis,* that proof by jury could only be ordered by the judge if the defendant asked for it. The crown avoided the difficulty partly by treating the indictment for lesser crimes as equivalent to a conviction.[49] But in cases of serious crimes the crown began to adopt barbarous measures to compel consent. In 1275, the Statute of Westminster I[50] directed that notorious felons who refused to put themselves on the inquisition for felonies before the Justices at the suit of the King should be put "*en la prison forte et dure, come cears qui refusent estre a la commune ley de la tere*"—in a strong and hard prison like those who refuse to stand to the common law of the land. This became the *peine forte et dure,* an atrocious torture for those who refused to plead. It is described in the case of John de Dorley and Sir Ralph Bloyho.[51]

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[48] *See* McKechnie 361. The expression *inquisitio ad vite vel membrorum* appears in Norman sources. *See* Brunner, Schw. 474. In 1231 twelve jurors who had given a verdict as to whether an appeal was false were asked "*quo waranto fecerunt sacramentum illud de vita et membris sine waranto Dom Regis.*" 2 Bracton's Notebook 457, case 592.

[49] 1 Pollock & Maitland 559; 2 *id.* at 652.

[50] 3 Edw. 1, c. 12 (1275).

[51] "[T]hat he should be put in a house on the ground in his shirt, laden with as much iron as he could bear, and that he should have nothing to drink on the day when he had anything to eat, and that he should drink water which came neither from fountain nor river." Y.B. Horwood 30 & 31 Edw. 1, at 530 (1303).

This situation lasted until 1772, when a statute[52] directed that such persons should be treated as if convicted by verdict or confession. Only then was the accused deprived of his right to "have his law"—*la ley de la tere*, the *lex terrae*, the law of the land—that is, his claim to ordeal as the ancient method of proving his innocence.[53] Finally, in 1827, another statute[54] directed the court to enter a plea of not guilty.[55]

In spite of this theoretical reverence to the original meaning of *per legem terrae* in connection with proof by jury in criminal cases, the term gradually assumed a more general interpretation in the fourteenth century as equivalent to "by due process." Interestingly enough, this happened largely for the purpose of asserting the supremacy of the jury procedure, which was the procedure of the common law courts, over an even newer procedure which had developed in the King's Council under the influence of the ecclesiastical procedure.

The King's Council dealt with many cases in which the common law courts were unable to give relief.[56] The common law had become increasingly rigid and formalistic and unable to develop along equitable lines, and the procedure in the common law courts was cumbersome and costly. In contrast, the procedure in the King's Council was simple, speedy, and informal. It proceeded by bill or petition, accompanied by examination of the parties and witnesses.[57] However, the Council often used its great powers in an arbitrary manner to benefit powerful individuals. Moreover, the lawyers resented the wide jurisdiction of the Council because it encroached upon their province. In addition, the Council was identified with the Crown and its prerogatives and therefore viewed by Parliament with much suspicion.[58]

For these reasons, Parliament and the lawyers sought to secure the supremacy of the common law by instituting a number of petitions and statutes designed ostensibly to guard against the exercise of arbitrary power by the King. They either thought or pretended to think that chapter 39 of the Magna Carta fulfilled this purpose. Thus, in 1331 there was an enactment "that no man . . . shall be attacked by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels seised into the King's hands against the Form of the Great Charter, and the law of the land."[59] A further attempt to restrict the procedure of the King's Council in favor of the common law was made in 1350.[60]

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[52] An Act for the More Effectual Proceeding Against Persons Standing Mute on Their Arraignment for Felony or Piracy, 12 Geo. 3, c. 20 (1772); *see* THAYER 77-78.

[53] MCKECHNIE 341-42.

[54] An Act for Further Improving the Administration of Justice in Criminal Cases in England, 7 & 8 Geo. 4, c. 28 (1827).

[55] The reason for enduring this horrible torture was the doctrine that one who had not been convicted did not forfeit his lands. MCKECHNIE 341-42; THAYER 77 n.1.

[56] Meyer, *supra* note 37, at 1186-87.

[57] 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 485 (3d ed. 1923) [hereinafter cited as HOLDSWORTH].

[58] *Id.* at 486-87.

Finally, in 1354, came the statute cited above that no man "shall be ousted from his land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law."[61] The right to answer meant the right to answer to the accusation and, in case of a denial, to have a proof procedure.[62] Consequently, the 1354 enactment meant exactly the same as the famous chapter 39 of the Magna Carta that every man's person and property would be protected against arbitrary rule, and that he could only be deprived of life, liberty, and property pursuant to regular court proceedings. "By due process of law" meant exactly what it said, and was the same as was formerly expressed by the term *per legem terrae*, by the law of the land.

Why the King chose to use the expression "due process of law" rather than the term "law of the land" is open to interpretation. It is very probable that he wanted to escape the interpretation that the law of the land meant the procedure of the common law to the exclusion of the new procedure. This interpretation finds support in a statute of 1363 where the procedure in the King's Council was clearly acknowledged as due process. The statute provided that in order to protect people against persons making false suggestions to the King out of malice or otherwise, anyone who proceeded by suggestions in the Council had to give surety, and if his suggestion was found evil, he was to incur the same punishment that the other should have had.[63]

Evidently the commons were persistent, because in 1368 a statute enacted "by the request of the commons by their petitions" found it necessary to specify that the proceedings the commons wished to recognize as legal were those "according to the old law of the land."[64] The commons again had complained that false accusers had made their accusations out of revenge and for personal gain, and that some persons so accused had been taken, and others were made to appear before the King's Council "by writ, and otherwise upon grievous pain against the law." The King assented "that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original according to the old law of the land: and if any thing from henceforth be done to the contrary, it shall be void in the law and holden for error."[65]

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[59] 5 Edw. 3, c. 9 (1331).

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> Whereas it is contained in the great charter of the franchises of England, that none shall be imprisoned nor put out of his freehold, nor of his franchises nor free custom, unless it be by the law of the land; it is accorded, assented, and established, that from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done, in due manner, or by process made by writ original at the common law; nor that none be out of his franchises, nor of his freeholds, unless he be duly brought into answer and forejudged of the same by the course of the law; and if anything be done against the same it shall be redressed and holden for none.

25 Edw. 3, st. 5, c. 4 (1350).

[61] 28 Edw. 3, c. 3 (1354); *see* note 27 *supra* and accompanying text.

[62] *See* Meyer, *supra* note 37, at 1183.

[63] 37 Edw. 3, c. 18 (1363).

Notwithstanding this prohibition to proceed by suggestion, a statute was passed in 1393 which again made clear that the procedure in the King's Council continued to be recognized as a lawful procedure. The statute provided that people compelled to come before the King's Council or in the Chancery by writs founded on untrue suggestions should be entitled to damages according to the discretion of the Chancellor.[66] While the medieval protests and statutes never succeeded in limiting the large powers of the King and his Council, they were used by the lawyers of the seventeenth century in their fight against the prerogatives of the King, especially against his unlimited discretionary powers to make arrests.[67]

In 1628, in the Proceedings in Parliament relating to the Liberty of the Subject, which followed *Darnel's* case,[68] chapter 39 of the Magna Carta, as renewed in 9 Henry 3 (1225), received a great deal of attention. The discussions, however, made clear that the then members of the English Parliament no longer understood the procedural terms of the Great Charter. Thus, Littleton explained that "lawful judgment of his peers" meant "by a jury of peers, ordinary jurors,"[69] although the trial jury had not yet come into existence in 1215.[70] He said

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[64] 42 Edw. 3, c. 3 (1368).

[65] *Id.*

[66] 17 Rich. 2, c. 6 (1393).

[67] *See* Meyer, *supra* note 37, at 1187-89.

[68] *See id.* at 1184-86; 3 T. Howell, State Trials 59-234 (1809) [hereinafter cited as Howell].

[69] 3 Howell 86.

[70] *See* 1 Pollock & Maitland 173 n.3. "For a legal instrument to call the verdict of recognitores [jurors] a judgment, would have been as gross a blunder in 1215 as it would be at the present time." *Id.* *See also* McKechnie 393. "The barons would have repudiated trial by jury if they had known it. They desired [here as in chapter 21] that questions affecting them should be 'judged' before fellow barons, and in the normal case, by the duellum. They would have scorned to submit to the verdict of 'twelve good men' of their own locality. Their inferiors must have no voice in determining their guilt or innocence." *Id.*

> Law of the land must of necessity be understood in the nation, to be due process of law, and not the law of the land generally, or otherwise it would comprehend bond-men [whom we call Villain] who are excluded by the word 'Liber'; for the general law of the land doth allow their lords to imprison them at their pleasure without cause, wherein they only differ from the freemen in respect of their persons, who cannot be imprisoned without a cause.[71]

All through the debate, it was apparent that law of the land was no longer clearly understood. But they all understood due process of law as a procedural term. The controversy was merely whether due process of law included only the procedure of the common law, as some wanted it interpreted, or, as the Attorney General maintained, "any due and regular proceedings of law." [72]

*"The Law of the Land" and "Due Process of Law" in American Constitutions.* The American colonists were given the "rights of Englishmen" in the earliest charters of colonization.[73] Under this blanket provision they claimed the protection of the Magna Carta, although none of its privileges and rights seems to have been expressly granted by the King.[74] It is, however, interesting that the language of the Great Charter's chapter 39 began to appear in colonial laws.[75]

At the time of the adoption of the United States Constitution, eight of the original 13 states had included provisions based on chapter 39 of the Magna Carta in their constitutions.[76] Some of them followed the version of 9 Henry 3, chapter 29[77] almost verbatim. Massachusetts and

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[71] 3 Howell 86.

[72] *Id.* at 151-53.

[73] R. Mott, Due Process of Law 8 (1926).

[74] *Id.* at 8-9.

[75] *Id.* at 9-13.

[76] Md. Declaration of Rights art. XXI (1776), *reprinted in* 3 F. Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (1909) [hereinafter cited as Thorpe]; Mass. Declaration of Rights art. XII (1780), *reprinted in* 3 Thorpe 1891; N.H. Bill of Rights art. XV (1784), *reprinted in* 4 Thorpe 2455; N.Y. Const. art. XIII (1777), *reprinted in* 5 Thorpe 2632; N.C. Declaration of Rights art. XII (1788), *reprinted in* 5 Thorpe 2788; Pa. Declaration of Rights art. IX (1776), *reprinted in* 5 Thorpe 3083; S.C. Const. art XLI (1778), *reprinted in* 6 Thorpe 3257; Va. Bill of Rights § 8 (1776), *reprinted in* 7 Thorpe 3813.

[77] *See* 9 Henry 3, c. 29 (1225). Maryland's Declaration of Rights provided "[t]hat no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land." Md. Declaration of Rights art. XXI (1776), *reprinted in* 2 Thorpe 1688. North and South Carolina's provisions were identical. *See* note 76 *supra*.

New Hampshire[78] had similar provisions in slightly more modern language. Pennsylvania and Virginia simply said "that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." [79] All these states had in common that the place of those provisions was among articles, or even in the very same article, providing for procedural protections.[80]

The New York constitution of 1777 also had a provision using some of the language of chapter 39 of the Magna Carta.[81] It was obviously connected with political rights.[82] But without exception, all the constitutions of the original states which contained provisions based on chapter 39 of Magna Carta used the term law of the land. The Northwest Ordinance of July 13, 1787, also contained a provision in section 14, article two, that "[n]o man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land . . . ." However, the same article also assured the inhabitants of the territory that they would always be entitled to the benefits of judicial proceedings according to the course of the common law.[83]

When on May 29, 1787, the first draft of the Federal Constitution, prepared by Charles Pinckney, was placed before the Federal Convention, article six contained the following words:

> All acts made by the legislature of the United States, pursuant to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land; and all judges shall be bound to consider them as such in their decisions.[84]

On June 15, 1787, William Patterson offered another draft which, as was mentioned in the debates, had the purpose of stressing the sovereignty of the states.[85] In four subsequent sessions the provision was

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[78] *See* note 76 *supra.*

[79] *See* note 76 *supra.*

[80] Massachusetts, New Hampshire, Pennsylvania, and Virginia placed these provisions in the same article granting procedural protections. *See* note 76 *supra.*

[81] Article 13 of the New York constitution of 1777 provided "That no member of this state shall be "disfranchised, or deprived of any rights or privileges secured to the subjects of this state by this Constitution, unless by the law of the land, or the judgment of his peers." N.Y. Const. art XIII (1777), *reprinted in* 5 Thorpe 2632.

[82] *See* 1 C. Lincoln, Constitutional History of New York 173, 522 (1906); notes 104-111 *infra.*

[83] 1 Stat. 52 (1787).

[84] 5 J. Elliot, Debates on the Adoption of the Federal Constitution 131 (1907).

[85] It contained the following provision:

> 6. Resolved, That all acts of the United States in Congress, made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation, vested in them, and all treaties made and ratified under the authority

debated and amended, but each of those amendments agreed upon retained the words "supreme law of the respective states." [86] However, on September 17, 1787, when the Convention adopted the final version of the Constitution, it returned to the expression "law of the land" as used in the first draft.[87]

There is no doubt what was meant by this expression in article six. It comprised all the laws of the entire land, federal as well as state, and among them, the United States Constitution, the acts of Congress and the treaties were to be "supreme" so as to supersede inconsistent laws of the states.[88]

Soon after the adoption of the United States Constitution, eight states submitted proposals for its amendment.[89] Four of them, Pennsylvania, Virginia, New York, and North Carolina,[90] proposed provisions containing the Magna Carta clause.[91] The proposals of Pennsylvania and North Carolina were almost replicas of their respective constitutional provisions. Virginia split section eight of its bill of rights in two, de-

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> of the United States shall be the supreme law of the respective states, so far forth as those acts or treaties shall relate to the said states or their citizens; and that the judiciary of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding . . . .

*Id.* at 191-93.

[86] *Id.* at 322, 375. In later versions, the phrase "respective states" was replaced with the phrase "several states." *Id.* at 379, 467. The last amendment which used this phrase was agreed upon on August 23, 1787, and read as follows:

> This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges of the several states shall be bound thereby in their decisions, any thing in the constitutions or laws of the several states to the contrary notwithstanding.

*Id.* at 467.

[87] *See* note 84 *supra* and accompanying text. The second paragraph of article six now reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

[88] *See, e.g.,* Free v. Bland, 369 U.S. 663, 666 (1962); Franklin Nat'l Bank v. New York, 347 U.S. 373, 374 (1954); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

[89] *See* Meyer, *supra* note 37, at 1190-94.

[90] They were the same states which had proposed the prohibition of excessive bail. *See id.* Evidently they were the states with the greatest concern for procedural protections on the federal level.

[91] E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 183, 184, 190, 200 (1957).

voting section nine to the famous Magna Carta text.[92] Pennsylvania, North Carolina, and Virginia all used the term "by the law of the land." The only exception was New York. Its proposed Magna Carta clause contained the term "due process of law." [93]

It is obvious that Madison followed the New York text when, on June 8, 1789, he offered in Congress his version of the amendment containing the clause.[94] The Select Committee, in its report of July 28, 1789, made few changes, none of them substantial.[95] On August 24, 1789, it was passed by the House as article eight without further changes.[96] However, on September 9, 1789, the clause passed the Senate as part of article seven which became the text of the fifth amendment to the United States Constitution.[97] The Constitution now contained both terms: "the law of the land" and "due process of law."

Apparently the framers intended those terms to mean exactly what they meant in modern language and in the context in which they were used–law of the land undoubtedly was to mean the laws of the entire nation among which the federal laws were to be supreme; due process of law, as indicated by its connection with procedural safeguards, was to mean the regular procedure.

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[92] *Id.* at 183-84.

[93] It provided:

> That no Person ought to be taken imprisoned or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law.
>
> That no Person ought to be put twice in jeopardy of life or limb for one and the same offence, nor, unless in case of impeachment, be punished more than once for the same offence.

*Id.* at 190.

[94] The pertinent text of Madison's proposal read:

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

*Id.* at 207.

[95] *Id.* at 211. It placed trial before punishment ("to more than one trial or one punishment for the same offence") and changed the last clause ("nor shall private property be taken for public use without just compensation."). *Id.*

[96] *Id.* at 214.

[97]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V.

This interpretation is strengthened by the fact that the framers found it necessary to include in the Constitution express provisions prohibiting not only Congress, but also the states, from passing any bill of attainder.[98] In England this device was used to punish treason and treasonable practices against the state. It was an enactment by the British Parliament which accused, convicted, and sentenced a person to death and forfeiture of his property without, in most cases, giving the accused a right to answer the accusation and to defend himself.[99] Bills of attainder were as effective in cutting off the accused from the regular procedure as were the writs of execution of King John.[100] As has been shown, the barons tried to protect themselves against this in chapter 39 of the Magna Carta by making the King guarantee them access to the *lex terrae*, the regular proof procedure.[101] Due process of law, which later replaced the term *lex terrae*, contains the same guarantee, namely the access to the regular procedure. Evidently, this guarantee was still of such importance to the early Americans that they included it in their state and federal constitutions.[102]

This much can be learned from the language of the Constitution in its historical setting. Whether or not the framers had any other intentions cannot be learned from the debates, because neither in the state conventions proposing the amendments nor in Congress was there any considerable discussion on those points.[103] Any possible additional explanation can only be gained by an examination of comparable contemporary legislation.

The precedents came from New York which, as has been shown,[104] had influenced the selection of the term due process of law for the fifth amendment. New York had a long experience with the terms due process of law and the law of the land, reaching back more than a century before the adoption of the Federal Constitution. New York's Charter of Liberties and Privileges of 1683 contained similar phrases.[105]

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[98] *Id.* art. I, §§ 9, 10.

[99] 4 J. HATSELL, PRECEDENTS AND PROCEEDINGS IN THE HOUSE OF COMMONS 73, 85-99 (1818).

[100] *See* note 31 *supra*.

[101] *See* notes 38-39 *supra* and accompanying text.

[102] *See* note 468 *infra* and accompanying text (modern version of due process in the EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS).

[103] The texts were prepared largely in committees. *See* 5 J. ELLIOT, *supra* note 84, at 139, 189, 376, 467, 535, 536, 564; *cf*. R. MOTT, *supra* note 73, at 152-53.

[104] *See* note 93 *supra* and accompanying text.

[105] 13. That noe freeman shall be taken and imprisoned or be disseized of

The phrase "law of this province," used in the New York Charter, was obviously derived from article 29 of the 1225 version of the Magna Carta,[106] and replaced *lex terrae*, the law of the land. This shows that *lex terrae* was no longer understood, because the words "the law of this province" obviously referred to the general laws of New York province. Due course of law, on the other hand, followed the version of 28 Edw. 3, chapter one[107] and clearly referred to procedure.

In its Constitution of 1777, New York dropped these provisions and replaced them with the section cited above[108] which prohibited the deprivation of a citizen's franchise, or rights or privileges secured by the New York constitution "unless by the law of the land, or the judgment of his peers."

On January 26, 1787, New York passed An Act concerning the Rights of the Citizens of this State. There, both terms due process of law and the law of the land were used, the first one promising the observation of due process, the second one referring to the constitutional and statutory laws which say what due process is in New York.[109] On July 26, 1788, the New York Convention proposed amendments to the United States Constitution which, as discussed above, contained only the reference to due process of law.[110]

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> his ffrehold or Libertye or ffre customes or be outlawed or Exiled or any other wayes destroyed nor shall be passed upon adjudged or condemned But by the Lawfull judgment of his peers and by the Law of this province. . . .
>
> 15. That noe man of what Estate or Condicon soever shall be putt out of his Lands or Tenements, nor taken, nor imprisoned, nor disherited, nor banished nor any wayes distroyed without being brought to answer by due Course of Law.

1 C. LINCOLN, *supra* note 82, at 95, 100-01.

[106] *See* 9 Hen. 3, c. 1 (1225).

[107] 28 Edw. 3, c. 1 (1354); *see* notes 27-28 *supra* and accompanying text.

[108] N.Y. CONST. art. XIII (1777), *reprinted in* 5 Thorpe 2632; *see* note 81 *supra*.

[109] The pertinent provisions of the Act were:

> *Second*, That no Citizen of this State shall be taken or imprisoned, or be disseised of his or her Freehold, or Liberties, or Free-Customs; or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful judgment of his or her Peers, or by due Process of Law.
>
> *Third*, That no Citizen of this State shall be taken or imprisoned for any Offence, upon Petition or Suggestion, unless it be by Indictment or Presentment of good and lawful Men of the same Neighbourhood where such Deeds be done, in due Manner, or by due Process of Law.
>
> *Fourth*, That no Person shall be put to answer without Presentment before Justices, or Matter of Record, or due Process of Law, according to the Law of the Land; and if any Thing be done to the Contrary, it shall be void in Law, and holden for Error.

Law of Jan. 26, 1787, 2 [1787-89] N.Y. Laws 1.

[110] *See* note 93 *supra* and accompanying text.

The New York constitution of 1821 again contained both terms—the law of the land in connection with the protection of citizenship rights,[111] and due process of law in connection with the protection of procedural rights of the accused in criminal cases.[112] Both provisions have been part of New York's constitutions ever since.[113]

*The Misunderstanding Created by Coke.* When New York began to use both terms, the law of the land as well as due process, in one and the same document, it might be expected that they were to mean two different things. However, when we turn for enlightenment to the court decisions, we are disappointed. Although at times a judge will give a good definition of the law of the land and of due process of law in their modern meaning, there is no clear line of decisions explaining the difference between the two terms.

The cause of much of that confusion was undoubtedly Sir Edward Coke. He had an influential position and was a prolific writer, but he knew nothing of the procedural forms of early English law. Holdsworth, who admired Coke in many respects, said of him, "his historical work is almost contemptible." [114] Unfortunately, he wrote a commentary to the Magna Carta.[115] There he followed what McKechnie called "his vicious method" of projecting into the Magna Carta the legal principles of his own day by which he "misled generations of commentators." [116] Since Coke was in the forefront of the fight for the supremacy of the common law courts and the common law,[117] these principles were for him those of the common law. Thus in section (2)1 of his commentary he explained *per legem terrae* to mean "by the common law, statute law, or customs of England;" [118] but in section (8) thereof he said that the true sense of *nisi per legem terrae* appeared in 37 Edw. 3, chapter eight: [119]

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[111] N.Y. Const. art. VII, § 1 (1821). This section closely followed article XIII of the constitution of 1777. *See* N.Y. Const. art. XIII (1777), *reprinted in* 5 Thorpe 2632; note 81 *supra* and accompanying text.

[112] N.Y. Const. art. I, § 7 (1821). This section closely followed the fifth amendment to the United States Constitution. *See* U.S. Const. amend. V; note 97 *supra* and accompanying text.

[113] *See* N.Y. Const. art. I, §§ 1, 6; N.Y. Const. art. I, §§ 1, 6 (1821), *reprinted in* 5 Thorpe 2654-55.

[114] 5 Holdsworth 472-73.

[115] 2 E. Coke, Institutes of the Laws of England 1-78 (London 1797) (hereinafter cited as Institutes).

[116] McKechnie 385. The nonsense Coke was capable of writing is shown by his comment on "*nec super eum ibimus, nec super eum mittemus*" in chapter 39, whereby King John promised that he will not go himself (*ibimus*) nor send his men (*mittemus*) to imprison a baron, take away his property or inflict other punishment through the use of armed force without judgment and legal proof. Coke interpreted this passage thus: "No man shall be condemned at the King's suite, either before the King in his bench, where the pleas are *coram rege* (and so are the words, *nec super eum ibimus*, to be understood) nor before any other commissioner, or judge whatsoever, and so are the words, *nec super eum mittemus*, to be understood, but by the judgment of his peers, that is equalls, or according to the law of the land." 2 Institutes 46.

[117] 5 Holdsworth 423-56; *see* Meyer, *supra* note 37, at 1185-87.

> where the words, by the law of the land, are rendered without due process of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned or put out of his freehold without process of law; that is by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ originall of the common law.[120]

Of course, the grand jury had absolutely nothing to do with the *lex terrae* in the Magna Carta. But Coke quite obviously did not understand that term of the Magna Carta. Had he been able to explain its correct meaning,[121] he would have been right in saying that it meant the same as due process. But he translated it simply as the law of the land, gave it a meaning which embraced both substantive and procedural law, and then made it equivalent to due process, a procedural term. This made no sense, because the meaning of the law of the land in Coke's time was not the same as that of due process of law.

*The Court Decisions.* Regrettably, American judges have read Coke and have been greatly influenced by him. Where, as in New York, the law of the land and due process of law appear in two sections of the same article of the constitution,[122] Coke's equalization of the two terms was bound to cause confusion, especially when both sections had to be dealt with in the same case. This happened in *Taylor v. Porter.*[123] Judge Bronson turned to Coke for enlightenment[124] and seemed to be puzzled by the explanation that the two terms meant the same. When turning to due process, he said that even if there can be doubt on the law of the land, there can be none on the meaning of due process of law. "The words 'due process of law,' in this place cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property."[125] As can be seen, Judge Bronson had no difficulty in giving the words due process the meaning they obviously conveyed, namely the regular procedure as prescribed by the applicable laws for the benefit of everyone. In later cases, the New York Court of Appeals gave similar definitions of the meaning of due process in article one, section six of the state's constitution.[126]

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[118] 2 Institutes 45.

[119] 37 Edw. 3, c. 8 (1363).

[120] 2 Institutes 50.

[121] *See* notes 35-36 *supra* and accompanying text.

[122] N.Y. Const. art. VII, §§ 1, 7 (1821) (later § 6), *reprinted in* 5 Thorpe 2647-48.

[123] 4 Hill 146 (N.Y. Sup. Ct. 1843).

[124] *Id.* at 146-47.

As regards the term law of the land of article one, section one of the New York constitution, there are some definitions obviously uninfluenced by Coke which convey a meaning distinctly different from due process of law. Thus Judge Woodward of the Appellate Division of the New York Supreme Court defined the term to mean "a general and public law, equally binding on every member of the community. . . . The right to life, liberty and property of every individual must stand or fall by the same rule of law that governs every other member of the body politic or 'land' under similar circumstances."[127]

Judge Woodward had taken this definition from an opinion of Judge Catron of the Supreme Court of Tennessee–later Justice of the United States Supreme Court–in *Vanzant v. Waddel.*[128] Judge Catron had construed the clause as part of article XI, section eight of the Tennessee constitution of 1796.[129] It was an almost verbatim replica of section nine of the amendments proposed by the Virginia Convention of June 27, 1788,[130] and, of course, a translation of *lex terrae* of the well known

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[125] *Id.*

[126] In *Westervelt v. Gregg,* the Court of Appeals said: "[T]he constitution of this state declares that 'no person shall be deprived of life, liberty or property without due process of law.' . . . Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." 12 N.Y. 202, 209 (1854) (citations omitted); *see* N.Y. Const. art. I, § 6 (1846). In In re *Coates,* the court gave the following definition:

> due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has the opportunity to be heard, and to defend, enforce, and protect his rights. . . . Due process does not, however, "guarantee to the citizen of a state any particular form or method of state procedure. . . . Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard."

9 N.Y.2d 242, 249, 173 N.E.2d 797, 801, 213 N.Y.S.2d 74, 79 (1961), *quoting* Dohany v. Rogers, 281 U.S. 362, 369 (1929). *See also* Embury v. Connor, 3 N.Y. 511, 517 (1850).

[127] People v. Folks, 89 App. Div. 171, 179, 85 N.Y.S. 1100, 1105 (1903) (Woodward, J., concurring); *see* Rosin v. Lidgerwood Mfg. Co., 89 App. Div. 245, 254-55, 86 N.Y.S. 49, 57 (1903).

[128] 10 Tenn. 260, 270 (1829).

[129] "That no freeman shall be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. XI, § 8 (1796), *reprinted in* 6 Thorpe 3422.

[130] *See* E. Dumbauld, The Bill of Rights and What it Means Today 183-84 (1957); note 92 *supra* and accompanying text.

Magna Carta clause. Undoubtedly, in the connection in which it appeared it meant procedure. But Judge Catron construed the law of the land in accordance with modern understanding, comparable to the use of the words in article six of the United States Constitution.

In contrast thereto is a decision of the United States Circuit Court for the District of Rhode Island[181] where Judge Curtis was called upon to construe the clause in the constitution of Rhode Island, "nor shall he be deprived of life, liberty or property, unless by the judgment of his peers, or the law of the land." [182] Judge Curtis cited Coke's explanation that the words the law of the land mean due process of law.[183] He accepted this interpretation without question and proceeded to hold a state statute unconstitutional because it conflicted with the state constitution's guarantees that in all criminal prosecutions the accused shall have an unconditional right to a trial by jury and to be informed of the nature and cause of the accusation. Judge Curtis pointed out that both these requirements were in the same article which demanded conformity to "the 'law of the land,' that is, due process of law." [184] Judge Curtis was correct in his ruling that a state statute which violates procedural safeguards guaranteed by the state constitution deprives a person of the process due to him under the constitution which a state legislature has no authority to change.

We now see that the framers of the fifth amendment displayed great wisdom when they refrained from using the words the law of the land in connection with procedural safeguards, but used instead the words due process of law. These words mean exactly what they say, namely the regular procedure to which an individual is entitled under the applicable laws. They convey the same idea which *lex terrae* in the Magna Carta conveyed, the procedure to which a freeman was entitled under the then applicable laws.[185]

On the federal level, the due process clause of the fifth amendment was rarely the object of judicial interpretation before the advent of the fourteenth amendment. One of the earliest Supreme Court decisions is *Murray's Lessee v. Hoboken Land & Improvement Co.*[186] In that case the question was whether the seizure and sale of land belonging to a former collector of customs, by a Marshal of the United States under a distress warrant issued by the Solicitor of the Treasury pursuant to the Act of Congress of May 20, 1820, to collect public moneys from the former customs official, was due process of law as required by the fifth amendment.[187] Justice Curtis, delivering the opinion of the Court, said that whether this was due process must be ascertained from the Constitution itself, and from those settled usages and proceedings of the common and statute law of England acted on after the settlement of this country.[188] The Court then held that the proceedings authorized by the Act of 1820 were due process of law on several grounds. First, since the establishment of the English monarchy, the laws of England had provided for a summary method for the recovery of debts due to the Crown, especially those due from receivers of the revenues. Second, this procedure entered into the legislation of the colonies and provinces, and more especially of the states, after the Declaration of Independence and before the formation of the United States Constitution. Third, no provision in the Constitution restrains Congress from authorizing such proceedings.[189]

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[181] Greene v. Briggs, 10 F. Cas. 1135 (No. 5764) (C.C.R.I. 1852). The case was in the federal court because of diversity of citizenship. *Id.* at 1139.

[182] R.I. CONST. art. I, § 10 (1842), *reprinted in* 6 THORPE 3223.

[183] 10 F. Cas. at 1140.

[184] *Id.* at 1143.

[185] *See* notes 35-46 *supra* and accompanying text.

[186] 59 U.S. (18 How.) 272 (1855). There was only one other Supreme Court decision in which due process was considered before the fourteenth amendment became effective. Bank of Columbia v. Okley, 17 U.S. (4 Wheat.) 234 (1819).

Although the Court may have been right in the result, it is obvious that the reasoning of Mr. Justice Curtis cannot be accepted. He was correct in stating that Congress is not free to make any process "due process of law" by its mere will. But the extent and limits of congressional power are dictated by the Constitution. The laws and customs of England, even though adopted by the colonies, provinces and states, cannot have any restraining influence on the legislatures of the states, because the states which had constitutional provisions continuing certain common and statute laws of England expressly reserved to their legislatures the power to amend or repeal them.[140] The United States Constitution contains no provision continuing any laws of England as adopted by the states. Therefore, they have no binding effect on Congress whatsoever where the Constitution empowers Congress to legislate.[141] Outside of the Constitution, Congress cannot exercise any legislative power, "it being under and by virtue of that instrument alone they derive their power." [142] But where Congress has the power to legislate, its only limitations are those embodied in the Constitution.

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[187] No objection had been taken to the warrant. 59 U.S. (18 How.) at 275.

[188] *Id.* at 276-77. Justice Curtis said:

> The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. . . . We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

*Id.*

[189] *Id.* at 277-80. Mr. Justice Curtis concluded that although due process of law usually includes regular allegations, opportunity to answer, and a trial according to some "settled course of judicial proceedings," there may be cases "in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial. . . ." *Id.* at 280.

After the ratification of the fourteenth amendment, the number of cases reaching the Supreme Court on the due process clause increased considerably.[143] In *Davidson v. New Orleans*[144] Justice Miller, speaking for the Court, noted the remarkable increase in the number of cases based on the due process clause of the fourteenth amendment. He found abundant evidence that there existed a strange misconception of the scope of this provision. Every unsuccessful state litigant seemed to look upon it as a means of invoking the jurisdiction of the Supreme Court to pass on the justice of the decision against him and on the merits of the legislation on which such a decision was based.[145] The Court then found that due process of law has been observed if a party had,

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[140] *See* Del. Const. art. XXV (1776), *reprinted in* 1 Thorpe 566-67; Fla. Const. art. XVII, § 1 (1838), *reprinted in* 2 Thorpe 680-81; Md. Const. art. III (1851), *reprinted in* 3 Thorpe 1713; N.J. Const. art. X, § 1 (1844), *reprinted in* 5 Thorpe 2613; N.Y. Const. art. VII, § 13 (1821), *reprinted in* 5 Thorpe 264[illegible].

[141] "It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the Union." Wheaton v. Peters, 33 U.S. (8 Pet.) 590, 657-58 (1834).

[142] Campbell v. Morris, 3 Harris & McHenry 535, 554 (Md. 1797).

[143] *See* note 145 *infra* and accompanying text.

[144] 96 U.S. 97, 103-104 (1877).

[145] Justice Miller's words were:

> There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.

*Id.*

"by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." [146]

What Mr. Justice Miller referred to was the tendency of litigants to read into the due process clause of the fourteenth amendment something different from what its words imply, in fact incorporate into it the guarantees of other amendments although they are not mentioned in the fourteenth amendment. Thus, in *Walker v. Sauvinet*,[147] Walker claimed he had a constitutional right to a jury trial. In that case, Sauvinet, a Negro, sued Walker, a licensed keeper of a coffee-house in New Orleans, for refusing him refreshments because he was a man of color.

Article 13 of the constitution of Louisiana guaranteed all persons, without distinction on account of race, equal access to public accommodations. A statute passed on February 23, 1869, gave aggrieved persons a damage claim in case of violation of article 13. Another statute passed on February 27, 1871, for the enforcement of article 13 provided for a jury trial upon request of any party to the suit, otherwise for a trial by the court; but if the jury did not agree or failed to render a verdict, then the judge was to decide the case. Walker asked for a trial by jury. The case was tried before a jury which failed to agree. Thereupon, Sauvinet, by his counsel, moved that the court decide the case. Walker objected, alleging that the Louisiana statute was unconstitutional. After consideration, the Court rendered a judgment against Walker for $1,000. This judgment was affirmed upon appeal to the Louisiana Supreme Court whereupon Walker sued out a writ of error. The United States Supreme Court affirmed, Chief Justice Waite delivering the opinion of the Court. He first pointed out that the seventh amendment to the United States Constitution which guarantees a jury trial in suits at common law where the value in controversy exceeds twenty dollars relates only to trials in the courts of the United States. A trial by jury in suits at common law pending in a state court is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge.[148] Then Chief Justice Waite went on to place the terms due process and the law of the land as understood at the time the Constitution was made into the right perspective. He said:

> Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it

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[146] *Id.* at 105.

[147] 92 U.S. 90 (1875).

[148] *Id.* at 90-93.

> is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States made in pursuance thereof—or with any treaty made under the authority of the United States, Art. 6 Const. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.[149]

In its decision, the Court relied upon the authority of *Edwards v. Elliot,*[150] which held that the seventh amendment did not apply to trials in the state courts, invoking as authority *Barron v. Baltimore*[151] and a number of other Supreme Court decisions, among them *Twitchell v. Commonwealth.*[152] In that case the Court specifically held that the fifth and sixth amendments did not apply to the states. In general, it pointed out that this was no longer an open question, because by *Barron v. Baltimore,* and a number of subsequent Supreme Court decisions, it had been settled that the first ten amendments to the Constitution do not bind state governments, only the federal government. In other words, the Supreme Court adhered to the doctrine of stare decisis.

Notwithstanding such clear pronouncements, cases continued to reach the Supreme Court in which litigants insisted that the due process clause of the fourteenth amendment had made the requirements of the Federal Bill of Rights applicable to the states; in other words, that it did not mean what it said and what it meant in the fifth amendment. Thus, in *Hurtado v. California,*[153] the Supreme Court was asked to declare a conviction for murder and a death sentence of a California court void as violative of the due process clause of the fourteenth amendment because the prosecution was by information and not by grand jury indictment. It was claimed, in substance, that due process of law is equivalent to the law of the land in the Magna Carta which includes the fundamental laws and liberties of England that crossed the Atlantic and became established in the fundamental laws of the states; that due process of law was originally introduced into the United States Constitution as a limitation upon the powers of the central government, and has been added as an additional security of the individual against oppression by the states themselves; that one of the institutions which is part of the law of the land is that of the grand jury, an indictment or presentment by which in cases of alleged felonies is an essential part of due process of law.[154] In support of this theory, plaintiff in error invoked the Supreme Court's decision in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[155] where Justice Curtis had said that the national legislature was not only bound by the Constitution, but also by "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors" which were acted on by them after the settlement of the country.[156] Hurtado's counsel concluded therefrom that any proceeding otherwise authorized by law, which is not sanctioned by usage or which supersedes and displaces one that is, cannot be regarded as due process of law.[157]

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[149] *Id.* at 93.

[150] 88 U.S. (21 Wall.) 532, 557 (1874).

[151] 32 U.S. (7 Pet.) 242, 247 (1833).

[152] 74 U.S. (7 Wall.) 321, 325-26 (1868).

[153] 110 U.S. 516 (1884).

Justice Matthews found such inference unwarranted. In his opinion, to hold that the sanction of settled usage both in England and in this country is essential to due process of law would be to "deny every quality of the law but its age" and render it incapable of progress and improvement.[158] He wisely refused to freeze into the Constitution the ancient English laws and practices. Rather, he proceeded to do what any judge must do if he wishes to remain true to his oath of office—he looked at the words of the Constitution and let them be his guide.

A look at the Constitution reveals that in the fourteenth amendment, the phrase due process of law appears in the following sentence: "nor shall, any State deprive any person of life, liberty or property, without due process of law." [159] This is modelled after a passage in the fifth amendment. The fifth amendment expressly provides for the continuation of indictment by grand jury in a "capital or otherwise infamous crime," [160] a provision not included in the fourteenth amendment. This compelled Justice Matthews to draw the obvious conclusion. He said:

> According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary,

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[154] *Id.* at 520-21.

[155] 59 U.S. (18 How.) 272 (1855).

[156] 110 U.S. at 528; *see* notes 136-139 *supra* and accompanying text.

[157] Article 8 of the California constitution of 1849 had provided for grand jury indictment in a "capital or otherwise infamous crime." This was changed by article 8 of the constitution of 1879 which provided: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law." CAL. CONST. art. 8 (1879), *reprinted in* 1 THORPE 391, 413. According to the theory advanced on behalf of Hurtado, California could never have abolished the requirement of indictment by grand jury, even after England abolished it in 1933.

[158] 110 U.S. at 528-29.

[159] U.S. CONST. amend. XIV, § 1.

[160] U.S. CONST. amend. V.

> that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini,* the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declaration to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the States, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.[161]

Then Justice Matthews found it necessary to explain that to satisfy due process, a law "must not be a special rule for a particular person or a particular case, but . . . 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.' "[162] Therefore acts of attainder,[163] bills of pains and penalties and similar legislation which would cut off a person from access to the regular procedure generally applicable to his case, are incompatible with due process of law.[164] In other words, due process of law is process due to a person pursuant to the applicable general laws, and any law designed to exclude a particular person from access to the regular procedure applicable to his case would violate due process.

In 1891, Chief Justice Fuller reached the same conclusion in *Leeper v. Texas.*[165] He declared:

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[161] 110 U.S. at 534-35.

[162] *Id.* at 535.

[163] *See* notes 98-101 *supra* and accompanying text.

[164] 110 U.S. at 535-36.

[165] 139 U.S. 462 (1891).

> It must be regarded as settled . . . . [t]hat by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.[166]

This, in essence, was the meaning of chapter 39 of the Magna Carta when it required proceedings *per legem terrae,* and the meaning of by due process of law in later English statutes; and it remained the meaning when embodied in the fifth and fourteenth amendments. If the Supreme Court had adhered to its rule of stare decisis, there would be no lack of clarity in the meaning of due process today.

*The Supreme Court's Departure From the Text of the Constitution and From "Stare Decisis."* However, the Supreme Court did not do this. It discarded its rule of stare decisis as well as the rule that the foremost guide to judicial interpretation must be the text of a written law. The onslaught came through two court invented doctrine–1) through "substantive due process," which is a contradiction in terms, and 2) through the so-called "incorporation doctrine," which claims that the fourteenth amendment had made the Federal Bill of Rights applicable to the states. Neither doctrine finds any justification in the language and history of the Constitution.

Since the two doctrines are interwoven, it is necessary to consider them both. It must be pointed out that the Supreme Court for a long time refused to adopt the incorporation doctrine and that its practical effect was brought about through the doctrine of substantive due process.

*The Incorporation Doctrine.* Advocates of the incorporation doctrine rely mainly on a study of Dr. Horace Flack,[167] whose position, however, has been largely refuted by a more recent and more specialized study of two law professors, Charles Fairman and Stanley Morrison.[168] Its first part, written by Professor Fairman, deals with the historical aspects and the original understanding of the fourteenth amendment;[169] the second part, written by Professor Morrison, deals with its judicial interpretation.[170]

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[166] *Id.* at 467-68, *citing* Hurtado v. California, 110 U.S. 516, 535 (1884).

[167] H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

[168] Fairman & Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

Flack shows that Representative John A. Bingham initiated a number of proposals in the Joint Committee on Reconstruction which, if adopted, would have given Congress power to enforce, in every state of the Union, the Federal Bill of Rights as found in the first eight amendments.[171] These proposals were not accepted. What finally passed Congress as the proposed fourteenth amendment contained no words forcing the Federal Bill of Rights on the states. Nevertheless, Flack was of the opinion that by the first section of the fourteenth amendment Congress intended to make the Bill of Rights binding upon, or applicable to, the states.[172] He based his opinion predominantly on statements in Congress made by Representative Bingham, the author of the amendment, and Senator Jacob M. Howard who sponsored it in the Senate.[173]

Fairman and Morrison did not underestimate the significance of statements made by the sponsors of the measure. But they were able to produce other statements inconsistent therewith[174] which indicated that it was not the general understanding that the fourteenth amendment had incorporated the Bill of Rights. More important, they showed that the states which ratified it had no such understanding, because those which had constitutional provisions incompatible with the Bill of Rights saw no necessity to amend them, nor did other states feel prevented from subsequently adopting such incompatible provisions.[175] Among these states was Michigan, Senator Howard's own state, which in 1859 had practically abolished the grand jury altogether.[176] Moreover, Congress itself showed by its own action that it did not regard the fourteenth amendment to have incorporated the Federal Bill of Rights, for it admitted to the Union new states with constitutional provisions inconsistent with the Bill of Rights.[177]

The most important proof against the incorporation doctrine is, of course, the language of the fourteenth amendment itself. If the framers really intended it to incorporate the Federal Bill of Rights, why did they not simply say so? Senator Howard had said that this was accomplished by the clause forbidding the states to "make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." [178] If that were so, it must contain the due process clause of the fifth amendment. Why then was it found necessary to include a separate due process clause in the fourteenth amendment? Neither Senator Howard nor Representative Bingham ever explained this discrepancy. In *Hurtado v. California*, Justice Matthews had emphasized that according to recognized rules of statutory construction it is forbidden to assume that any part of the important fourteenth amendment is superfluous.[179] The natural and obvious inference then is that the privileges and immunities clause did not incorporate the Federal Bill of Rights.

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[169] *Id.* at 5-139.

[170] *Id.* at 140-73.

[171] H. FLACK, *supra* note 167, at 55-74. *See also* CONG. GLOBE, 39th Cong., 1st Sess. 14, 813, 1063-66, 1083-87 (1866).

[172] *Id.* at 94.

[173] *Id.* at 81, 87.

[174] Fairman & Morrison, *supra* note 168, at 61, 63, 64, 71, 72-78.

[175] *Id.* at 84-132.

[176] *Id.* at 115-16.

[177] *See* note 271 *infra.*

This obviously was also the understanding of Senator Luke P. Poland, a former Justice and Chief Justice of the Supreme Court of Vermont, who opened the debate on July 5, 1866, and whose statement was inconsistent with Howard's opinion. He said that the privileges and immunities clause "secures nothing beyond what was intended by the original provision in the Constitution in [article] IV, [section] 2, that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states;" that this had been disregarded in many of the states; and that section five would grant Congress the power to enforce it.[180] He then explained the purpose of the clause. Congress had recently enacted the so-called Civil Rights Bill to destroy all state legislation which denied full citizenship rights to Negroes. The power of Congress to do this had been doubted. The privileges and immunities clause removed any such doubt by giving Congress clear constitutional authority to enforce United States citizenship rights throughout the country and compel their observance. He continued: "Now that slavery is abolished, and the whole people of the nation stand upon the basis of freedom, it seems to me that there can be no valid and reasonable objection to the residue of the first proposed amendment," namely the due process and equal protection clauses.[181]

Here is a clear and logical explanation of the language of the first section of the fourteenth amendment. The privileges and immunities clause is meant to assure Negroes the enjoyment of full citizenship rights throughout the country; the due progress clause is meant to guarantee them the procedure due to every free citizen under the applicable laws of the states, a right Negroes did not enjoy before; and the equal protection clause assures them the equal protection of the laws of the states.

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[178] CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (remarks of Senator Howard).

[179] 110 U.S. 516, 534 (1884); *see* note 161 *supra* and accompanying text.

[180] CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (remarks of Senator Poland).

[181] *Id.* The text of the residue referred to read: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

As a matter of fact, both Senator Howard and Representative Bingham had acted in a manner clearly inconsistent with their statements. Both were members of the Joint Committee on Reconstruction which prepared the text of the fourteenth amendment. On April 21, 1866, Representative Thaddeus Stevens introduced a plan of reconstruction as an amendment to the Constitution. Section one thereof read: "No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[182] Representative Bingham moved to amend the section by adding: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[183] Representative Bingham's amendment was rejected, Senator Howard voting against it. The first section was then adopted without Representative Bingham's amendment. Later he moved to insert as section five the following:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[184]

This was accepted and it became part of section one of the fourteenth amendment.

Unfortunately, the Journal reveals only that there was discussion on both amendments offered by Representative Bingham, but not what it was. It is obvious, however, that the framers did not want to give Congress authority to prescribe for the states what was "just compensation" for the taking of private property, and that they intended to adopt the due process clause of the fifth amendment, and no more, certainly not any other part of the Federal Bill of Rights. Subsequent inconsistent statements by Howard and Bingham can therefore not be taken at face value.

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[182] JOINT COMMITTEE ON RECONSTRUCTION, JOURNAL, 39th Cong., 1st Sess. 28 (1866), *reprinted in* S. Doc. No. 711, 63d Cong., 3d Sess. 28 (1915).

[183] *Id.* at 29.

[184] *Id.* at 30.

Certainly the Supreme Court did not do this. In case after case it had rejected claims that either the privileges and immunities clause or the due process clause of the fourteenth amendment incorporated the first eight amendments to the Constitution.[185] To the cases already discussed,[186] it will suffice here to mention two additional cases, in which this position again clearly appears.

In re *Kemmler*[187] involved the constitutionality of a New York statute of 1888 providing for the execution of the death penalty by electrocution. It was claimed that this was cruel and unusual punishment which was forbidden by the privileges and immunities clause and the due process clause of the fourteenth amendment. Justice Fuller speaking for a unanimous court rejected this contention. He pointed out that the provision prohibiting cruel and unusual punishment in the New York constitution was intended to operate upon the legislature of the state, while the identical provision in the eighth amendment to the United States Constitution was intended to operate on Congress only and was not applicable to the states. This has not been changed by the fourteenth amendment, neither by its privileges and immunities nor its due process clause.[188]

In *Maxwell v. Dow*[189] the Supreme Court subjected the privileges and immunities clause to an even more extensive examination. The plaintiff in error had been convicted of robbery in a Utah state court by a jury of eight and sentenced to imprisonment for eighteen years on the basis of an information by the prosecuting attorney. This was due process under the applicable laws of Utah, but was at that time not considered due process under the Federal Constitution.[190] Plaintiff in error, by his counsel, contended that prosecution by information and trial by a jury of only eight persons abridged his privileges and immunities as a citizen of the United States, and that a trial by such a jury and his subsequent imprisonment by reason of that jury's verdict deprived him of his liberty without due process of law.[191]

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[185] *See* Fairman & Morrison, *supra* note 168, at 140, 143-57.

[186] *See* notes 145-165 *supra* and accompanying text.

[187] 136 U.S. 436 (1890).

[188] *Id.* at 446-49. Justice Fuller stated that New York courts had upheld the statute and continued:

> The decision of the state courts sustaining the validity of the act under the state constitution is not reexaminable here, nor was that decision against any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution of the United States.
>
> . . . .
>
> The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of the State. Protection of life, liberty and property rests primarily with the States, and the amendment furnishes an additional guarantee against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state goverments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.

*Id.* (citations omitted).

[189] 176 U.S. 581 (1900).

The Court pointed out that counsel had urged in substance that the first ten amendments are by virtue of the fourteenth amendment to be regarded as privileges or immunities of a citizen of the United States, and that therefore "the States cannot provide for any procedure in state courts which could not be followed in a federal court because of the limitations contained in those amendments."[192] The Court cited previous cases in which such a contention had been rejected, and it rejected it again. It said, in substance, that "the privileges and immunities of citizens of the United States" as distinguished from those of the states are very few. They have always been regarded as being essentially the right of a citizen of the United States to "have free ingress and egress to and from any other state [to do business therein] subject to the same duties and restrictions as the inhabitants thereof respectively;"[193] the right to reside in any state and become a citizen thereof by virtue of such residence; the right by the usual modes to acquire and hold property, and to protect and defend it in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights; and the right to be exempt, in property and person, from taxes or burdens to which the property or persons of citizens of the same state are not subject.[194] The fourteenth amendment did not add to those privileges or immunities.[195] The rights secured by the Bill of Rights exist in favor not only of citizens, but of any individual as against the federal government. They are not connected with national citizenship.[196]

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[190] The Supreme Court had held that trial by jury under article III of, and the sixth amendment to, the Constitution required a jury of twelve. Thompson v. Utah, 170 U.S. 343, 349 (1898); Callan v. Wilson, 127 U.S. 540, 549 (1888). *See also* Patton v. United States, 281 U.S. 276, 288 (1930); Rasmussen v. United States, 197 U.S. 516, 528 (1905). The result in all of these cases was changed by *Williams v. Florida*, 399 U.S. 78, 86 (1970).

[191] 176 U.S. at 584-85.

[192] *Id.* at 587.

[193] *Id.* at 588, *citing* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

[194] *See id.* at 588-96.

[195] *Id.* at 596.

Finally, Justice Peckham responded to counsel's attempt to support his position by the citation from a speech made in the Senate when the proposed fourteenth amendment was under consideration.[197] This is important because when 47 years later Justice Black urged the Court to abandon long established precedents and adopt the incorporation theory, he relied heavily on statements made in Congress to justify his position.[198] In *Maxwell v. Dow*, the Supreme Court said:

> What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. . . .
>
> In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.[199]

By 1900, it had been well established by the Supreme Court that privileges and immunities and due process of law in the fourteenth amendment meant the same as the identical words in article four and in the fifth amendment, and that neither clause incorporated the Bill of Rights. It also was clear that the clause due process of law by itself added nothing to the constitutional provisions but pointed to the regular procedure applicable in a particular case.

However, the undermining or, in a very real sense, the subversion of the historical and constitutional term due process of law had already been started by the Supreme Court itself through its creation of a fateful new concept, "substantive due process," by which due process embarked on a life of its own.

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[196] *Id.* at 595-96.

[197] *Id.* at 601-02.

[198] Adamson v. California, 332 U.S. 46, 92-120 (1947) (Black, J., dissenting).

[199] 176 U.S. at 601-02 (citations omitted).

*Substantive Due Process.* Substantive due process is actually self-contradictory. It is a contradiction in terms, a phrase of which the parts are expressly inconsistent. The source of substantive due process cannot be found in English law nor in the United States Constitution. It is an invention of American judges. As has been pointed out by various legal authors,[200] its source must be sought in the predilection of the judges for natural law.

The idea of "natural law" is very ancient. It presumes that there is a law derived from God as the source of the common good which binds everyone, even the rulers. It is a law of natural justice and fairness, discoverable by human reason without passion. It found its way into the Roman law. It first influenced the formation of the *ius gentium*, which is defined as "the law which natural reason established among all mankind" and which is "observed equally by all peoples," whereas the *ius civile* of each people is peculiar to itself.[201] Later it shaped the *Corpus Juris* which was seen as "the triumph of Roman jurisprudence in its approximation to this noble goal" of the *ius naturale*.[202] Natural law also influenced modern codifications. For instance, the modern legal institutions of private property and the binding force of contracts have their roots in natural law.[203]

Natural law also strongly influenced the legal thinking of American lawyers and the fundamental principles of American constitutions. But instead of looking at these instruments as the embodiment of such natural law principles as the framers wished to codify, the courts came to treat natural law as a higher law, which commanded a judge's conscience to declare statutes void although they did not violate any constitutional provisions.[204] This trend appeared first in the state courts, but was later adopted by the Supreme Court.[205]

Perhaps the earliest decision which pointed to the due process clause as a useful constitutional cloak for the enforcement of extra-constitutional natural law principles was *Wynehamer v. People*,[206] decided in 1856 by the New York Court of Appeals. In that case the majority construed the clauses "the law of the land" and "due process of law" in the New York constitution as a guarantee of vested rights. In 1855 the state legislature had passed an act regulating and restricting the sale of intoxicating liquors. The court found that the act violated the state constitution because it substantially destroyed the commercial value of intoxicating liquors owned and possessed by persons in the state when the act took effect. In a strongly worded dissenting opinion, Judge T.A. Johnson insisted that the constitution had no such meaning. He vehemently objected to its "strained construction" by the majority and raised a warning voice to judges who tended to disregard constitutional limitations when they applied to themselves.[207] Ten years later the same New York Court of Appeals called the constitutional construction of the majority opinion in the *Wynehamer* case "the inconsiderate dicta of some judges."[208]

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[200] Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931); Fairman & Morrison, *supra* note 168, at 165.

[201] GAIUS, INST., *commentarius primus*, I, § 1; *see* Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 163-64 (1928).

[202] Corwin, *supra* note 201, at 168.

[203] *Id.* at 167.

[204] *See* Grant, *supra* note 200, at 57.

[205] *See id.* at 58-65.

It took the United States Supreme Court another thirty years to discover the due process clause as a convenient constitutional cloak for invalidating acts of Congress as well as of state legislatures whenever a majority of the judges happened to find them undesirable. Of course this could be accomplished only by distorting the term due process of law to such a point as to deprive it of its historical, logical, and etymological meaning and to turn it into a "meaningless meaning."[209]

This development was foreshadowed in pronouncements in earlier decisions, particularly in dissenting opinions.[210] The first decisions came in 1896 and 1897 when the Supreme Court gave the due process clause of the fourteenth amendment the meaning of requiring the observation of natural law doctrines in eminent domain. If one wishes to state what happened in simple clear words, one would have to say that under the cloak of due process, the Supreme Court smuggled into the fourteenth amendment the eminent domain clause of the fifth amendment which the framers of the fourteenth amendment had expressly excluded.[211]

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[206] 13 N.Y. 378 (1856).

[207]
> It is claimed that courts, independent of constitutional limitations upon legislative power, have the right to annul statutes and pronounce them void, whenever, in their judgment, they are in conflict with the fundamental principles of the government and tend to individual oppression, although not in conflict with any provision of the constitution of the United States or of the state. I know of no such power vested in the courts, and they should never attempt to usurp it. The limitations upon legislative power are written in the fundamental law, and that is the standard by which all questions of power exercised by the legislature must be tried.

*Id.* at 470, 476 (Johnson, J., dissenting).

[208] Metropolitan Bd. of Excise v. Barrie, 34 N.Y. 657, 668 (1866).

[209] *See* P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT XIV (1970).

[210] *See generally* Grant, *supra* note 200, at 65-78.

The first case was *Missouri Pacific Ry. v. Nebraska.*[212] The railroad company had granted to two private firms the privileges of erecting two elevators on its right of way, but had refused permission to other private persons to erect a third elevator. Upon complaint, the Board of Transportation, after notice and a hearing in which the parties presented evidence and arguments, found that there were not sufficient facilities for the handling and shipping of grain; that the third elevator was necessary for the convenience of the public; that its erection would not materially interfere with the operation of the railroad and the use of its grounds; and that the railroad's refusal was an unreasonable discrimination in violation of a state statute. The Board of Transportation ordered the railroad to grant to the complainants the same privileges on the same terms as already enjoyed by the owners of the two existing elevators. The state Supreme Court affirmed.

The United States Supreme Court reversed. It said that a raliroad corporation holds its property as private property subject to the public use for which it was incorporated. Any permission to a private party to occupy or use the property is within the railroad's discretion.[213] The Court was of the opinion that the order in question was, in essence and effect, a taking of private property for private use and concluded:

> The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.[214]

In 1897, the Supreme Court decided *Chicago, Burlington & Quincy R.R. v. Chicago.*[215] This case involved the extension of a public street across the right of way of the railroad company. After a hearing, the jury awarded a compensation of one dollar. The Illinois Supreme Court affirmed.[216] It found that the land had not been condemned, and that the extension of the public street would not prevent the railroad's use of the tracks and right of way. Neither could the railroad company claim compensation for a loss in the resale value of the land, since the railroad held it only for railroad purposes and could not sell it to the highest bidder. In short, the railroad would suffer no damage through the extension of the street.

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[211] *See* notes 183-184 *supra* and accompanying text.

[212] 164 U.S. 403 (1896).

[213] *Id.* at 414-15.

[214] *Id.* at 417. The Court cited a number of cases as "authority" for its new doctrine, none of them in point, and one in direct conflict with the new rule. *See* Grant, *supra* note 200, at 78-79.

[215] 166 U.S. 226 (1897).

[216] Chicago, B. & Q. R.R. v. Chicago, 149 Ill. 457, 37 N.E. 79 (1894).

The United States Supreme Court granted a writ of error. The railroad contended that the nominal award of one dollar had deprived it of its property without due process of law contrary to the prohibition of the fourteenth amendment. The city insisted that the question as to the amount of compensation was one of local law; and since that question was determined in the mode prescribed by the constitution and laws of Illinois, and the company had full opportunity to be heard, the requirement of due process of law had been observed.

Mr. Justice Harlan delivered the opinion of the Court. It is exactly 30 pages long and overflows with citations, many of them not relevant and some in direct conflict with the rule for which they are given as authority.[217] On former occasions, Justice Harlan had manifested his devotion to the great principles of natural law.[218] He recognized, of course, that the constitution and laws of Illinois had amply provided for the codification of those principles as far as the issue in the case, namely eminent domain, was concerned. He mentioned that the Illinois constitution prohibits the deprivation of life, liberty and property without due process of law, that it also provides that "[p]rivate property shall not be taken or damaged for public use without just compensation," and that such compensation, when not made by the state, shall be ascertained by a jury, as prescribed by law.[219] Justice Harlan further found that there had been court proceedings in accordance with the laws of Illinois in which the railroad appeared and asserted its claim.

If Justice Harlan had followed the language of the United States Constitution and established precedents, he would have been compelled to stop right here and declare that Illinois had observed due process as required by the fourteenth amendment. Perhaps he might have been justified in inquiring whether the jury award of merely nominal compensation indicated that, while all the legally prescribed forms had been observed, the whole procedure had in reality been a sham, so that the due process requirement had not been met.

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[217] *See* Grant, *supra* note 200, at 79-81.

[218] *See* Hurtado v. California, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting). Unfortunately, the learned former Associate Justice's dissent displayed considerable confusion about the Magna Carta and the history of due process.

[219] ILL. CONST. art. I, § 2, 13 (1870).

However, Justice Harlan was obviously determined to fortify the Court's endeavor in *Missouri Pacific Ry. v. Nebraska*[220] to give the term due process of law a new meaning altogether. Consequently, he found it necessary to inquire whether due process of law requires compensation to be made or secured to the owner of private property taken for public use.[221] He said: "In determining what is due process of law regard must be had to substance, not to form." [222] He cited *Davidson v. New Orleans*, where the Court had expressed doubt whether "a State [can] make anything due process of law which, by its own legislation, it chooses to declare such." [223] But Justice Harlan did not cite the Court's conclusion in that case, namely that due process under the fourteenth amendment was satisfied if a party had "by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." [224] In fact, Justice Harlan disregarded this conclusion. Instead, he contemplated at length about the importance of the protection of private property as "a vital principle of republican institutions" and about the requirement of just compensation for property taken for public use as a doctrine of the common law, founded in "natural equity" and laid down by jurists as a principle of "universal law." [225] He came to the conclusion that a form of procedure prescribed by a state legislature to be observed in the taking of private property for public use is not due process of law if no provision has been made for compensation.[226]

It will be remembered that Justice Harlan had acknowledged that the Illinois constitution recognized the right of just compensation for the taking of private property for public use as a right of substantive law, and that Illinois statutes had provided for a procedure in condemnation proceedings in fulfillment of the state's constitutional command that a person may not be deprived of his property without due process of law. This, under all previous Supreme Court decisions, had satisfied the due process clause of the fourteenth amendment. But not any more, said Mr. Justice Harlan:

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[220] 164 U.S. 403 (1896); *see* notes 212-214 *supra* and accompanying text.

[221] 166 U.S. at 233.

[222] *Id.* at 235.

[223] *Id.*, *citing* Davidson v. New Orleans, 96 U.S. 97, 102 (1877).

[224] *See* Davidson v. New Orleans, 96 U.S. 97, 105 (1877).

[225] 166 U.S. at 235-36.

[226] Apparently, Justice Harlan expected a state to write substantive law into its procedural rules, for he said: "Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." *Id.* at 236.

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.[227]

Then, Justice Harlan proceeded to inquire whether the state proceedings complied with this newly invented concept of due process. He reiterated that the awards in the case had been made by a jury after the parties in interest had an opportunity to prove the facts in issue. He then found that the last clause of the seventh amendment—"and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law"—prevented him from reexamining the facts on which the verdict in the state court was based, and he affirmed the judgment.[228]

The amazing thing is that not one of the Justices objected. The entire Court gave its approval to a decision which first set out to create a new constitutional concept not found anywhere in the Constitution, but then suddenly remembered the existence of the Constitution and let the judgment of the state court stand out of respect for the seventh amendment.

The irony is that the laws of Illinois did in fact embody the principle of natural law that the state must protect private property, and if it takes it for public use, it must pay just compensation. There was therefore no real reason for the Supreme Court to display its concern for a fundamental law of universal fairness and justice, much less for the illegal creation of a new constitutional concept to protect it. But henceforth the *Chicago, Burlington & Quincy R.R.* case was "authority" for the new use of due process.

On the same day—March 1, 1897—the Supreme Court discovered still another use for due process of law—the protection of freedom of contract. In *Allgeyer v. Louisiana*,[229] the Supreme Court declared void a Louisiana statute affecting an insurance contract made and to be performed outside of Louisiana but concerning property within the state. The Supreme Court found that the statute deprived the defendants of their liberty without due process of law and violated the fourteenth amendment. It explained that the liberty mentioned in that amendment embraces the right to pursue any livelihood or avocation, and to enter into all contracts which may be proper, necessary, and essential for that purpose.[230]

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[227] *Id.* at 241.

[228] *Id.* at 242.

[229] 165 U.S. 578 (1897).

Again, in *Lochner v. New York*,[231] the Supreme Court held unconstitutional a New York statute limiting the working hours of employees in bakeries to 60 hours in a week, or 10 hours a day, on the ground that the statute interfered with the right of contract between employer and employees concerning the number of working hours.[232] The Court stated that "[t]he right to purchase or to sell labor is part of the liberty protected by [the fourteenth] amendment. . . ." [233] Even if we assume that freedom of contract is part of the "liberty" mentioned in the fourteenth amendment, the Constitution nowhere prohibits the states from depriving a person of life, liberty or property; only they cannot do this without due process of law. Evidently then, the Supreme Court simply read into the term due process of law the protection of the right of a party to freely enter into contracts.[234]

Obviously neither the text of the fourteenth amendment, nor its history, nor the history of due process permits an interpretation as that given by the Supreme Court in the cases just discussed. This is especially clear with respect to the just compensation clause, because, as has been pointed out before, the insertion of such a clause in the fourteenth amendment had been suggested in the Joint Reconstruction Committee which prepared the draft of the fourteenth amendment, but had been voted down.[235] There is simply no provision in the United States Constitution requiring the states to pay just compensation for the taking of private property for public use. This has been deliberately left to the laws of the states.

Nevertheless, by holding that due process of law in the fourteenth amendment guaranteed the payment of just compensation in cases of eminent domain, the Supreme Court had in fact broken with a long line of precedent and taken the first step of incorporating part of the Federal Bill of Rights into the fourteenth amendment. However, the Court continued to refuse to adopt the incorporation theory as a whole. Thus, in *Maxwell v. Dow*,[236] decided in 1900, the Supreme Court rejected the argument that a jury of twelve, then considered by the Supreme Court to be a necessary requirement in federal trials,[237] was required by the due process clause of the fourteenth amendment. In 1908, in *Twining v. New Jersey*,[238] the Court again rejected the theory that the personal rights secured by the Federal Bill of Rights had been made applicable to the states by the privileges and immunities clause of the fourteenth amendment.[239] Justice Moody, invoking the doctrine of stare decisis, found that it was "not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court." [240] But the plaintiff in error also had claimed violation of the due process clause of the fourteenth amendment, because the state trial judge had commented on the failure of the accused to testify. This, it was contended, was a violation of the privilege against self-incrimination, and a denial of due process of law. Since the Supreme Court had declared that one part of the fifth amendment, the just compensation clause, was part of due process in the fourteenth amendment, it seemed logical that another part of the fifth amendment, the privilege against self-incrimination, should also be included. But Justice Moody rejected the theory that the privilege against self-incrimination was part of the due process clause of the fourteenth amendment. He explained:

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[230] *Id.* at 589.

[231] 198 U.S. 45 (1905).

[232] *Id.* at 64.

[233] *Id.* at 53.

[234] The *Allgeyer-Lochner* line of cases has been modified, at least as it relates to "economic due process" and state regulation of its economic interests. *See, e.g.*, Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 533-37 (1949); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392-95 (1937); Nebbia v. New York, 291 U.S. 502, 523-24 (1934).

[235] *See* notes 183-184 *supra* and accompanying text.

> it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.[241]

Here we have it from an authentic source that according to the Supreme Court due process of law includes the meaning of "just compensation" and "freedom of contract." Does this make sense? Of course not. Mr. Justice Moody must have sensed it, for he continued: "Few phrases of law are so elusive of exact apprehension as this.

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[236] 176 U.S. 581, 602 (1900); *see* note 199 *supra* and accompanying text.

[237] *See* note 190 *supra*.

[238] 211 U.S. 78 (1908).

[239] *Id.* at 98-99, 114.

[240] *Id.* at 98.

[241] *Id.* at 99.

Doubtless the difficulties of ascertaining its connotation have been increased in American Jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power." [242]

Mr. Justice Moody was right insofar as due process had assumed an "elusive" quality because it had been "put to new uses as a limit on legislative power." But this was of the Court's own making, and in plain disregard of the Court's own limitations as prescribed by the Constitution. By putting a constitutional concept to "new uses" never contemplated by its framers, by its language, or by its history, the Court in fact amended the Constitution, an act for which it had no mandate. Where the Court adhered to its duty to interpret the Constitution and not to amend it, it had no difficulty in defining "due process," not even after *Twining v. New Jersey*. Thus, in 1915, Justice Pitney, speaking for the Court in *Frank v. Mangum*, again rejected an expansion of the due process clause in the fourteenth amendment. He considered it "perfectly well settled" that that clause referred to the regular procedure of the states.[243]

However, the Court persisted in inventing forever new meanings for due process of law in the fourteenth amendment. Thus in *Meyer v. Nebraska*[244] and in *Bartels v. Iowa*,[245] due process of law meant freedom to teach foreign languages to elementary school children.[246] In *Pierce v. Society of Sisters*,[247] it meant freedom of private instruction of school children. Therefore the Oregon Compulsory Education Act of 1922, requiring education in a public school of every child between eight and sixteen years, was held to violate the due process clause of the fourteenth amendment. In *Gitlow v. New York*,[248] due process meant freedom of speech and of the press. Only three years earlier, in 1922, in *Prudential Insurance Co. v. Cheek*,[249] the Supreme Court, by Justice Pitney, had stated:

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[242] *Id.* at 99-100.

[243]
> As to the "due process of law" that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.

237 U.S. 309, 326 (1915) (citation omitted).

Justices Holmes and Hughes dissented, but not because they disagreed with the Court's definition of due process. They found from the record that the trial was dominated by a mob and that therefore the defendant had not received the process due him under the state's law. *Id.* at 345 (Holmes & Hughes, JJ., dissenting); *accord*, Brown v. Mississippi, 297 U.S. 278 (1936); Moore v. Dempsey, 261 U.S. 86 (1923).

[244] 262 U.S. 390, 399 (1923).

[245] 262 U.S. 404 (1923).

[246] Justices Holmes and Sutherland dissented in *Bartels*. *Id.* at 412 (Holmes & Sutherland, JJ., dissenting).

[247] 268 U.S. 510 (1925).

> [T]he Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence.
>
> . . . .
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> . . . as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "freedom of speech" or the "liberty of silence"; nor, we may add, does it confer any right of privacy upon either persons or corporations.[250]

In this, it must be emphasized, the Supreme Court was absolutely correct. But in *Gitlow v. New York*, the Court found that it could and did "assume" that freedom of speech and of the press were among the fundamental rights and "liberties" protected by the due process clause of the fourteenth amendment against impairment by the states, and it brushed off its opinion in *Prudential Insurance Co. v. Cheek* as as an "incidental statement" not "determinative of this question." [251]

In *Stromberg v. California*,[252] the Court said that "the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech" and found that a state statute which is "so vague and indefinite as to permit the punishment of the fair use of this opportunity [for free political discussion] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment . . . ." [253] There is, of course, no such guarantee in the fourteenth amendment. In *Near v. Minnesota*,[254] due process again meant liberty of the press and speech; and in *Grosjean v. American Press Co.*,[255] it meant freedom of the press.

In *Powell v. Alabama*,[256] due process in the fourteenth amendment meant the right to counsel. The Alabama constitution guaranteed a right to counsel and, as Mr. Justice Butler pointed out in his dissenting opinion, aid of counsel had in fact been given.[257] The majority, however, found that the aid of counsel had been inadequate. Therefore, it could have reversed the state court's judgment on the ground that the defendants had not received the process of law due to them under the applicable state laws, as required by the due process clause of the fourteenth amendment.[258] But the majority preferred to add still another meaning to that clause, presumably because thereby it could incorporate the sixth amendment's right to counsel into the fourteenth amendment for future reference.

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[248] 268 U.S. 652, 666 (1925).

[249] 259 U.S. 530 (1922).

[250] *Id.* at 538, 543.

[251] 268 U.S. at 666.

[252] 283 U.S. 359 (1931).

[253] *Id.* at 368-69; *see* note 233 *supra* and accompanying text.

[254] 283 U.S. 697, 707 (1931).

[255] 297 U.S. 233 (1936).

[256] 287 U.S. 45 (1932).

In *De Jonge v. Oregon*,[259] due process meant the right of peaceable assembly. However, in *Adamson v. California*,[260] the Supreme Court reiterated its holding in *Twining v. New Jersey* and declared it to be "settled law" that the clause of the fifth amendment protecting a person against compulsory self-incrimination was not made applicable to the states by the privileges and immunities clause of the fourteenth amendment.[261] The Court further found that a California law which permitted comment on the failure of a criminal defendant to testify at his trial was not of such a nature as to impair the defendant's right to a fair trial protected by the due process clause of the fourteenth amendment.[262]

But in *Wolf v. Colorado*,[263] the Supreme Court found that the security of one's privacy against arbitrary intrusion by the police—which is at the core of the fourth amendment—was "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the

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[257] *Id.* at 73-77 (Butler, J., dissenting).

[258] *Cf.* Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). In *Brown*, the Court reversed a state court judgment and sentence of death based solely on confessions extracted by whippings amounting to torture. The unanimous Court found that the whole proceeding was a mere pretense of a trial and void under the fourteenth amendment. The record had made it clear that the defendants had not been granted due process under the applicable state laws as required by the fourteenth amendment.

[259] 299 U.S. 353, 364 (1937).

[260] 332 U.S. 46 (1947).

[261] The *Adamson* Court stated:

> It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

*Id.* at 50-51.

[262] *Id.* at 53-56.

[263] 338 U.S. 25 (1949).

Due Process Clause."[264] In other words, due process now meant the right to privacy against arbitrary intrusion by the police.[265]

In *Bartkus v. Illinois*,[266] Justice Frankfurter again affirmed the Court's rejection of the incorporation theory. He said:

> We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. . . . These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States.[267]

However, Justice Frankfurter went on to embrace the Court's natural law doctrine of due process, namely that this clause included only those concepts "implicit in the concept of ordered liberty," and that the fourteenth amendment prohibited to the states only those practices "repugnant to the conscience of mankind."[268] He then concluded that the prohibition of double jeopardy, one of the oldest and practically universal principles of western civilization,[269] was not such a "fundamental" law as to deserve inclusion into the due process clause.[270]

In the *Bartkus* case Justice Frankfurter had supported the Court's opinion that the due process clause of the fourteenth amendment did not incorporate the Federal Bill of Rights with ample and convincing evidence that neither Congress nor the thirty ratifying states had any such understanding.[271] Almost immediately thereafter there began a period in which the Supreme Court made a complete departure from what may have been left of the doctrine of stare decisis. It overruled long established precedents and incorporated into the fourteenth amendment one provision after another of the Federal Bill of Rights. All of this was supposed to be included in due process of law.

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[264] *Id.* at 27.

[265] *See* notes 273-278 *infra* and accompanying text.

[266] 359 U.S. 121 (1959).

[267] *Id.* at 124 (citations omitted).

[268] *Id.* at 127, *citing* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

[269] *See id.* at 151-55 (Black, J., dissenting).

[270] Of course, *ne bis in idem*, or the prohibition of double jeopardy, that is the prohibition of exposing a person to criminal prosecution and punishment twice for the same criminal act, is not connected with the true meaning of due process. It has been accepted in the West since Greek and Roman times as a fundamental principle of justice and equity. *See id.*

[271] *Id.* at 124-26, 140-49. Justice Frankfurter showed that only fifteen of the ratifying states had constitutions which were in accord with the fifth, sixth and seventh amendments to the United States Constitution at the time they ratified the fourteenth amendment, and that of these fifteen, four made alterations in their constitutions by 1875 which brought them into important conflict with one or more of these provisions of the Federal Constitution; that by 1890 only eleven of the thirty ratifying states

For instance, in 1949, the Supreme Court had indicated in *Wolf v. Colorado*,[272] that the fourth amendment's right of privacy is enforceable against the states through the due process clause of the fourteenth.[273] But it held that in a prosecution in a state court for a state crime the fourteenth amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. The Court referred to its decision in *Weeks v. United States*,[274] where it had held that in a federal prosecution, the fourth amendment barred the use of evidence secured through an illegal search and seizure. The Court explained that this ruling was neither derived from the requirements of the fourth amendment nor based on legislation, but that "[t]he decision was a matter of judicial implication."[275] In 1961, the Supreme Court overruled *Wolf* in *Mapp v. Ohio*,[276] and held that the exclusionary rule is an essential part of both the fourth and fourteenth amendments, enforceable in the same manner as other basic rights secured by the due process clause.[277] Due process now meant exclusion of illegally obtained evidence.

Of course, the fourth amendment says nothing about exclusion of illegally obtained evidence. It is obvious that the Constitution left the sanctions for violations of the fourth amendment to legislation. The fourteenth amendment neither says anything about search and seizure nor about exclusion of evidence as a sanction for illegal police action. In both *Wolf* and *Mapp* the Court was rightly shocked by the lack of state protection against arbitrary police action. But does this justify the creation by judicial fiat of a constitutional rule for which the Court has no constitutional mandate? Justice Harlan, joined by Justice Frankfurter and Justice Whittaker dissented in *Mapp*, lamenting the lack of judicial restraint and disregard for stare decisis displayed by the

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were in explicit accord with these provisions, and that the constitutions of twelve states admitted to the Union after the ratification of the fourteenth amendment had provisions different from the requirements of the fifth, sixth, or seventh amendments. *See* notes 175-177 *supra* and accompanying text.

[272] 338 U.S. 25 (1949).

[273] *See* notes 263-265 *supra* and accompanying text.

[274] 232 U.S. 383 (1914).

[275] 338 U.S. at 28.

[276] 367 U.S. 648 (1961).

[277] *Id.* at 657, 660.

majority.[278] But, as indicated before, the Supreme Court no longer had regard for stare decisis.

In *Robinson v. California*, the Court held that an infliction of cruel and unusual punishment by a state violated the eighth and fourteenth amendments.[279] The only authority cited for this new rule was *Francis v. Resweber*.[280] In that case the Court said in a dictum that "[t]he Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner," [281] citing as its only authority In re *Kemmler*.[282] But in the *Kemmler* case the Supreme Court has held explicitly that the eighth amendment does not apply to the states.[283] The Supreme Court actually never bothered to overrule this. Evidently it "assumed" that due process now meant protection against cruel and unusual punishment.

In *Gideon v. Wainwright*,[284] the Court changed its mind with respect to appointment of counsel to indigent criminal defendants. Overruling *Betts v. Brady*,[285] the Court now found this so "fundamental and essential to a fair trial" as to be part of the due process clause of the fourteenth amendment.

In *Malloy v. Hogan*,[286] the protection against self-incrimination became part of the fourteenth amendment.

In *Pointer v. Texas*,[287] the Supreme Court held that the sixth amendment right of an accused to confront the witnesses against him is such a "fundamental right" that it is made obligatory on the states by the fourteenth amendment. As a matter of fact, there was confrontation at the preliminary hearing in *Pointer*. The defendant was present and could have cross-examined. But the Court construed the constitutional requirement of "confrontation" as a right to cross-examination with assistance of counsel and held that a state could not introduce the transcript of the sworn testimony of a witness given at the preliminary hearing, if the defendant was not represented by counsel.[288]

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[278] "In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it." *Id.* at 672 (Harlan, J., dissenting).

[279] 370 U.S. 660, 666 (1962).

[280] 329 U.S. 459 (1947).

[281] *Id.* at 463.

[282] 136 U.S. 436, 446 (1890).

[283] *See* note 187 *supra* and accompanying text.

[284] 372 U.S. 335 (1963).

[285] 316 U.S. 455 (1942).

[286] 378 U.S. 1 (1964).

[287] 380 U.S. 400 (1965).

[288] *Id.* at 407.

In *Duncan v. Louisiana*,[289] the Court found that the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" required it to hold "that the Fourteenth Amendment guarantees a right to jury trial in all criminal cases which —were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[290] The effect of this decision was that Louisiana, which provided trial by jury for all felonies, was prohibited from trying charges of simple battery by the court alone. In *Benton v. Maryland*,[291] the Supreme Court changed its mind about double jeopardy[292] and held that the double jeopardy clause of the fifth amendment is enforceable against the states through the fourteenth amendment.

In In re *Winship*,[293] the Supreme Court reversed the determination of a New York family court judge ordering a 12-year-old boy convicted of larceny to be placed in a training school for an initial period of 18 months, subject to annual extensions until his 18th birthday, because the New York Family Court Act permitted such a determination to be based on a preponderance of the evidence. The Supreme Court regarded the proceedings as "criminal" in nature and held that the due process clause requires that in criminal cases conviction must be based upon proof beyond reasonable doubt of every fact necessary to constitute the crime charged. As Justice Black pointed out in his dissenting opinion,[294] the United State Constitution nowhere requires proof of guilt beyond a reasonable doubt. Wisely, it has left the standards of proof to the legislatures. But the Supreme Court created another constitutional rule by judicial fiat.

In *Engel v. Vitale*,[295] the Supreme Court held that to require recitation of a prayer—even though denominationally neutral—in a public school of New York is not permitted by the Constitution. In *Abington School District v. Schempp*,[296] the Court held that a Pennsylvania statute and a rule of the Board of School Commissioners of Baltimore City adopted pursuant to statutory authority which required the reading, at the opening of each school day, of verses from the Bible and the recitation of the Lord's Prayer violated the United States Constitution.

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[289] 391 U.S. 145 (1968).

[290] *Id.* at 148-49.

[291] 395 U.S. 784 (1969).

[292] *See* notes 266-270 *supra* and accompanying text.

[293] 397 U.S. 358 (1970).

[294] *Id.* at 377.

[295] 370 U.S. 421 (1962).

[296] 374 U.S. 203 (1963).

And in *Lemon v. Kurtzman*,[297] decided June 28, 1971, the Supreme Court held unconstitutional state statutes providing state aid to church-related elementary and secondary schools. In the Court's opinion, the constitutional provisions prohibiting all these state activities are supposedly contained in the first and fourteenth amendments. The first amendment contains a clause which reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The United States Constitution does contain provisions prohibiting the states from passing certain laws, as, for instance, any bill of attainder, ex post facto law, or law impairing the obligation of contracts.[298] But nowhere does the Constitution say that a state shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. This again was read into the due process clause of the fourteenth amendment by the Supreme Court, although freedom of religion or state aid to church related schools has absolutely nothing to do with due process.

As has been shown, the due process clause in the fourteenth amendment has been completely diverted by the Supreme Court from its original meaning and turned into a catch-all phrase to hold unconstitutional any state act which the Supreme Court does not like. It is only natural that this treatment of due process of the fourteenth amendment had to reflect on the due process clause in the fifth amendment.

Thus in *Aptheker v. Secretary of State*,[299] the Supreme Court held unconstitutional section six of the Subversive Activities Control Act of 1950,[300] which excluded a member of a Communist organization that is registered or under final order to register from the right to apply for or obtain a passport. The Court stated that the right to travel is an important aspect of the citizen's "liberty" guaranteed in the due process clause of the fifth amendment.[301]

The fifth amendment does not guarantee "liberty," not any more than the fourteenth amendment does. Their guarantee is that a citizen may not be deprived of his liberty without due process of law.[302] But as the Supreme Court has done with due process in the fourteenth amendment,[303] it simply read into the due process clause of the fifth amendment a guarantee of "liberty" to travel.

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[297] 403 U.S. 602 (1971).

[298] *See* U.S. CONST. art. I, § 10.

[299] 378 U.S. 500 (1964).

[300] Ch. 1024, § 6, 64 Stat. 993, *as amended*, 50 U.S.C. § 785 (1970).

[301] 378 U.S. at 505, 514.

[302] In his concurring opinion, Mr. Justice Black correctly pointed out that the fifth amendment, standing alone, confers no constitutional liberty to travel abroad at will. He would have held the whole act unconstitutional because (1) it constitutes a bill of attainder which article one, section nine of the Constitution forbids Congress from passing; (2) it restricts appellants' liberty on the basis of legislative and administrative factfindings that they are subversives without giving them a trial according to due

Not only has the due process clause of the fourteenth amendment reverberated back into the due process clause of the fifth amendment, but also another part of the fourteenth amendment, namely the equal protection clause. There is no clause in the United States Constitution which says that Congress may not deny to any person within its jurisdiction the equal protection of the laws. However, the Supreme Court supplied it by reading it into the due process clause of the fifth amendment.

Thus, in *Brown v. Board of Education*,[304] the Supreme Court had held that segregation of white and negro children in the public schools of a state solely on the basis of race denied to negro children the equal protection of the laws guaranteed by the fourteenth amendment. On the very same day the Supreme Court decided *Bolling v. Sharpe*.[305] In that case the Court was faced with the same issue with respect to the District of Columbia, namely the constitutionality of legally imposed school segregation on the basis of race. The Court itself stated that the legal problem in the District of Columbia is different from that in a state. The difference has been created by the Constitution itself. In article one, section eight, clause 17, Congress was given plenary power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. As pointed out elsewhere,[306] there is no equal protection clause in the Constitution which applies to Congress. The Supreme Court repeatedly has held that the fourteenth amendment does not apply to Congress and that the fifth amendment, which does, provides no guarantee against discriminatory legislation by Congress.[307] But now the Supreme Court simply cited some dicta in previous cases as "authority" for the maxim that "discrimination may be so unjustifiable as to be violative of due process."[308] It concluded that segregation in public education constitutes an arbitrary deprivation of the liberty

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process; and (3) it "denies appellants the freedom of speech, press, and association which the First Amendment guarantees." *Id.* at 514-17 (Black, J., concurring).

[303] *See* notes 200-298 *supra* and accompanying text.

[304] 347 U.S. 483 (1954).

[305] 347 U.S. 497 (1954).

[306] *See* note 386 *infra* and accompanying text.

[307] *See* Detroit Bank v. United States, 317 U.S. 329, 337 (1943); Curran v. Wallace, 306 U.S. 1, 13-14 (1939); Steward Machine Co. v. Davis, 301 U.S. 548, 584 (1937). Language to the effect that "discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment" had remained dictum. *See* 317 U.S. at 338.

[308] *See* notes 305-307 *supra*.

of negro children in violation of the due process clause and held explicitly "that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." [309]

As has been said before, neither the fourteenth nor the fifth amendment forbids the deprivation of liberty, and a statute doing that is not for that reason alone in violation of due process, but only when it bars access to the regular procedure applicable to the particular case. The maintenance of a dual school system has absolutely nothing to do with due process. Doubtless, the *Brown* decision rested on solid constitutional grounds, for to relegate negro children by law to separate schools could certainly not be reconciled with the equal protection of the law which the fourteenth amendment assures them. But the fifth amendment offers no such protection. The Supreme Court must have sensed the dubiousness of its new constitutional rule, for it found it necessary to explain that in view of its decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the federal government.[310]

Of course, it is not "unthinkable" at all that the duties imposed by the Constitution upon the states differ from those imposed upon the federal government,[311] although public policy may prompt Congress to adjust its duties toward the District of Columbia to those required by the Constitution of the states. However, it must be borne in mind that before May 17, 1954, it was generally understood that under the Supreme Court's own doctrine announced in *Plessy v. Ferguson*,[312] separate but equal facilities for negroes and whites were thought to be compatible with the Constitution. When the Supreme Court changed its doctrine to one more in accord with the text and spirit of the fourteenth amendment, Congress would very probably have made the necessary adjustments by appropriate legislation within a reasonable time. Instead, the Supreme Court preferred to rush in and create a new constitutional provision via the ever more expanding due process clause. *Bolling v. Sharpe* now became "authority" for the equalization of equal protection of the fourteenth amendment with due process in the fifth amendment.

A particularly instructive case is *Shapiro v. Thompson*.[313] In that case the Supreme Court held unconstitutional two state statutes which denied welfare assistance to persons residing within the state for less than a year immediately preceding their application for assistance, and an act of Congress which did the same for the District of Columbia. The Supreme Court based its holdings predominantly on the ground that the state statutes violated the equal protection clause of the fourteenth amendment, while the same provision in the District of Columbia was supposed to violate the due process clause of the fifth amendment.[314]

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[309] 347 U.S. at 500.

[310] *Id.*

[311] *See* note 307 *supra* and accompanying text.

[312] 163 U.S. 537 (1896).

[313] 394 U.S. 618 (1969).

In *Hurtado v. California*,[315] and in In re *Kemmler*,[316] the Supreme Court had held that the due process clause in the fourteenth amendment meant the same as that in the fifth amendment. But these were cases in which the Supreme Court still paid attention to the language of the Constitution.[317]

Now, after the Supreme Court has converted the due process clause of the fourteenth amendment into a catch-all phrase to be used by the courts to void legislative enactments at will, we get decisions to the opposite effect. Thus, the United States Court of Appeals for the Tenth Circuit said, in *Earnest v. Willingham*, "that a Federal agency may not, consistently with Fifth Amendment due process, do that which a State is forbidden to do by Fourteenth Amendment due process." [318] And the United States Court of Appeals for the District of Columbia Circuit said, in *Washington v. United States*, that in the relationship of the citizenry to criminal laws, the due process clause of the fifth contains the same "pledge of the protection of equal laws" as is evident from the fourteenth.[319] "For this reason," continued the court, "we freely utilize Fourteenth Amendment precedents." [320]

Thus, due process in the fifth amendment has become exposed to the same arbitrary use by the courts as due process in the fourteenth amendment. Since the Justices base their determination of what is due process in any given case on what "shocks the conscience," offends "a sense of justice" or "the community's sense of fair play and decency," [321] on whether the right under consideration is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," or on whether it is "a fundamental right," [322] it is no longer possible to predict whether a statute or the decision of a state or lower federal court will meet the subjective "standards" of five Supreme Court Justices.

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[314] *Id.* at 627, 641-42.

[315] 110 U.S. 516, 534 (1884).

[316] 136 U.S. 436, 448 (1890).

[317] *See* notes 153, 187 *supra* and accompanying text.

[318] 406 F.2d 681, 684 (10th Cir. 1969).

[319] 130 U.S. App. D.C. 374, 381-82, 401 F.2d 915, 922-23 (1969).

[320] *Id.* at 382 n.40, 401 F.2d at 923 n.40.

[321] Rochin v. California, 342 U.S. 165, 172-73 (1952).

[322] Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

Some of the best criticism of this practice has come from members of the Court itself. For instance, Justice Clark pointed out the undesirability of the Court's approach to due process,

> in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free.[323]

Even more to the point was the criticism of Justice Black who repeatedly condemned the Court's tendency to disregard the language of the Constitution. He objected to the view often expressed by the Supreme Court that "due process is an evolving concept" and that it therefore entails a "gradual process of judicial inclusion and exclusion" to ascertain those "immutable principles . . . of free government which no member of the Union may disregard," and he said:

> Thus the Due Process Clause is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an "immutable principl[e] of free government" or is "implicit in the concept of ordered liberty," or whether certain conduct "shocks the judge's conscience" or runs counter to some other similar, undefined and undefinable standard. Thus due process . . . is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that "no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government." It is impossible for me to believe that such uncon-

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[323] Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring).

> fined power is given to judges in our Constitution that is a written one in order to limit governmental power.[324]

It is clear that any attempt to define or explain due process of law in the light of recent Supreme Court decisions must fail because the Supreme Court has deprived this clause of any meaning and has used it as a constitutional cloak to proclaim at will new constitutional rules not found anywhere in the text of the Constitution. As the above cited examples indicate, some members of the Supreme Court have not been happy with the majority's departure from the Constitution through the misuse of the due process clause. No doubt the majority was induced to do this by the highest of motives. But while this practice may have achieved desirable results in isolated cases, its overall effect has not been good. As Justice Clark so wisely remarked, the Court's misuse of the due process clause has created uncertainty of the law, since no one is able to predict on what grounds the Court will void a law or set aside a judgment.[325] Worse, the tendency of judges of the highest tribunal of the land to disregard the text of the Constitution in favor of a "higher law" which their conscience dictates them to obey undoubtedly has influenced a growing trend among citizens of this country to disregard its laws and follow a "higher law" whenever they feel moved by their conscience. There is no doubt that for the country as a whole it would be better to leave changes of the Constitution to the constitutional amendment process than to have them dictated to the nation by federal judges on a case by case basis. If the people really want change, it takes less time for a constitutional amendment to go through the federal and state legislatures than it takes a case to wind its cumbersome way from the trial court all the way up to the United States Supreme Court.

From the foregoing it is clear that the only correct way of defining and explaining the meaning of a term used by the Constitution is first by its language, second through its history, and third through the understanding of the people who framed, accepted and first lived by it. By this way, the meaning of due process is not difficult to define. As its language implies, and as it was understood through its long history and defined by the Supreme Court during the first hundred years of its constitutional life, it means a constitutional guarantee to each person to have equal access to the regular procedure due to all alike under the laws applicable in their jurisdiction.

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[324] Duncan v. Louisiana, 391 U.S. 145, 168 (1968) (Black, J., dissenting).

[325] *See* note 323 *supra*.

### THE PRESUMPTION OF INNOCENCE

The claim has been made that pretrial detention abridges the presumption of innocence which is supposed to be included in the guarantee of due process. The easiest way to refute such an assertion is to point out that there has always been pretrial detention in capital cases, and that no one has ever seriously maintained that this violated due process of law. As explained above, the term "due process of law" as used in the Constitution is not a guarantee of any specific procedure. It merely points to the regular procedure applicable in a given case. For this reason, a presumption of innocence, whatever it may mean, can only be part of due process if it is part of the regular procedure applicable in the case under consideration. But because it has been so frequently insisted that the so-called presumption of innocence is a general provision of constitutional rank, it will be helpful to ascertain what that term means and whether it is really an inseparable part of due process of law.

California, for instance, defines the presumption of innocence in section 1096 of its Penal Code.[326] Consequently, in a case in which California criminal law would be applicable, the due process clause of the fourteenth amendment would require that the state prove the defendant guilty beyond a reasonable doubt. A number of other states, among them Illinois and Oregon, have similar statutory provisions.[327]

The statutory provisions just cited use the presumption of innocence to express a rule of proof. The Supreme Court, on the other hand, tried to distinguish between the two phrases. It said in *United States v. Fleischman*[328] that the presumption of innocence

> surrounds the defendant in a criminal prosecution. That presumption continues to operate until overcome by proof of guilt beyond a reasonable doubt and is not to be confused with burden of proof, which is a rule affecting merely the time and manner of proof.[329]

Fundamentally, this is another way of expressing that the burden of proving guilt is on the prosecution. Wigmore[330] expressed this in a similar way, but in addition he stressed the emotional value which the term conveys to the jury.

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[326] Section 1096 provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt." CAL. PENAL CODE § 1096 (West 1970).

[327] *See* ILL. ANN. STAT. ch. 38, § 3-1 (Smith-Hurd 1972); ORE. REV. STAT. § 136.520 (1971).

[328] 339 U.S. 349 (1950).

[329] *Id.* at 363.

In *Washington v. Clemmer*,[331] the United States Court of Appeals for the District of Columbia Circuit used the expression in a different way. It said that the presumption of innocence has meaning at the preliminary hearing; the accused is entitled to his liberty unless the Government can establish probable cause for his detention in accord with fair process. Similarly, in *United States* ex rel. *Rubinstein v. Mulcahy*,[332] the United States Court of Appeals for the Second Circuit said that the purpose of bail before trial is to insure the presence of the accused where required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect.

The Rhode Island constitution of 1842 seems to be the only American constitution which contains a presumption of innocence.[333] This provision is almost identical with article nine of the French *Declaration des droits de l'homme et du citoyen*—Declaration of the Rights of Men and Citizens—of August 26, 1789.[334] In the two last cited decisions as well as in the Rhode Island constitution and the French Declaration of the Rights of Men and Citizens, the presumption of innocence is used to indicate that an accusation is not a conviction, and though the law may permit the arrest of an accused, he retains his rights as a free citizen and is entitled to be treated differently from someone who has been convicted.

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[330] 9 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2511, at 407 (3d ed. 1940).

> [T]he presumption of innocence is in truth merely another form of expression for the rule that it is for the prosecution to adduce evidence and to produce persuasion beyond a reasonable doubt . . . . However, in a criminal case the term does convey a special and perhaps useful hint, over and above the other form of the rule of the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.

*Id.*

[331] 119 U.S. App. D.C. 226, 229, 339 F.2d 725, 728 (1964).

[332] 155 F.2d 1002, 1004 (2d Cir. 1946).

[333] Article one, section 14 reads: "Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person shall be permitted." R.I. Const. art. I, § 14 (1842), *reprinted in* 6 Thorpe 3224.

[334] Article nine reads: *"Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupablé, s'il est jugé indispensable de l'arréter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit etre sévèrement réprimée par la loi."* Translation by the author: "Every man being presumed innocent until he is declared guilty, if it is deemed indispensable to arrest him, any severity which is not necessary to secure his person, shall be severely repressed by the law." Déclaration des droits de l'homme et du citoyen, art. 9 (1789), *reprinted in* G. Berlia, Les constitutions et les principales lois politiques de la France 2 (7th ed. 2).

It is interesting to note that both these propositions for which the presumption of innocence is supposed to stand, namely 1) that the accuser has the burden of proving guilt, and 2) that the accusation does not raise a presumption of guilt, entered late into the system of the common law. They originated in the Roman law.

It is not possible here to go into the history of the burden of proof and the meaning of the burden of proving guilt. This would necessitate a full length article. Suffice it to say that the rules of burden of proof developed in Roman civil procedure. They require that proof be made by two parties to the court through rational means of proof, such as witnesses, experts, and documents, and that the court must base its decision on what has been alleged and proved in court.

In Roman civil procedure the plaintiff who asserted his right, such as a debt created by a loan, had the burden of proving it. If the defendant asserted its extinction, for instance through payment, he had the burden of proving it.[335] Reduced to its essentials, the burden of proof means that judgment must go against the party who has the burden of proving a fact and is unable to meet it.

Under Justinian certain presumptions developed, such as the presumption that everything that a married woman possessed was given to her by her husband or the presumption that a child born in marriage was a legitimate child. This kind of presumption was called *praesumptio iuris*.[336] A fact to which such a presumption attached did not have to be proved, and the burden of proof was cast on the one denying the truth of the fact. Thus a *praesumptio iuris* had the effect of shifting the burden of proof from the one who alleged to the one who denied. A *praesumptio iuris*, therefore, created an exception to the regular rule that the one who alleged a fact in support of his right had to prove it.

The purpose of the rules of burden of proof was to provide a fair and logical basis for the decision of the judges, for it was logical and fair to decide a fact against the litigant who had the burden of proof but was unable to meet it. However, inherent in those rules is a factor which European Continental lawyers came to call truth as to form. If the plaintiff proved that he had paid 100 dollars to the defendant as a loan and the defendant pleaded payment, but was unable to prove it, then the court had to decide as if the debt still existed, although it may in fact have been extinguished through payment. The court had to base its judgment on what appeared to be the truth rather than what was actually true, that is, in Continental legal language, on truth as to form.

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[335] 2 M. Bethmann-Hollweg, Der roemische Civilprozess 610 (1865) (Roman Civil Procedure). *See also* Paulus, Digest XXII, 3, 2 ("Ei incumbit probatio, qui dicit, non qui negat"—proof is incumbent on him who alleges, not on him who denies).

[336] A. Berger, Encyclopedic Dictionary of Roman Law 646 (1953).

In criminal procedure, however, the judgment could not depend on truth as to form.[337] Therefore the rules of burden of proof did not apply in criminal proceedings. There the rule was that the accuser had to prove the accusation;[338] if he could not, or if there was doubt, there could be no conviction.[339] This gave birth to the Continental rule *in dubio pro reo*, which means that if there is doubt with respect to any particular fact, it has to be resolved in favor of the accused.

Since the technical function of a presumption is to create an exception to the regular rule that the party who alleges must prove and to shift the burden of proof to the party who denies, it is obvious that, in a system with a firmly established rule that the accuser has the burden of proving his accusation, there is neither room nor need for a presumption of innocence. Consequently nothing was heard about it, as long as the Roman law remained faithful to itself. But, with the introduction of torture into criminal procedure for the purpose of extracting confessions, an element entered into it which was completely foreign to the Roman rule that the accuser had the burden of proving the guilt of the accused. Through torture, the accused was forced to become his own accuser and deliver the proof for his own destruction. Also, torture inflicted terrible punishment. Consequently, those who protested against the practice pointed out that to torture an accused before his guilt had been proved inflicted punishment on an innocent person. Beccaria, whose book *On Crimes and Punishment* probably had the greatest impact on the reforms of criminal law and procedure throughout Europe, for instance, emphasized that according to the law a person whose crime has not been proved was innocent. Torture perverted the law by making the accused his own accuser.[340] Beccaria, like the other protesters, drew

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[337] *See* T. MOMMSEN, RÖMISCHES STRAFRECHT 400 (1899) (Roman Criminal Law).

[338] This is still clearly expressed in the *Theodosian Code*, where it is said: "no one, according to the requirement of law, may prosecute a criminal action which he has proposed to institute, unless he undergoes the bond of an Inscription. For a person who has called into court the reputation, the fortune, and finally the status and the life of another must know that a suitable penalty threatens him if he should not prove what he charges." 3 THE THEODOSIAN CODE 9.1.11 (C. Pharr transl. 1952).

[339] K. GEIB, GESCHICHTE DES ROMISCHEN CRIMINALPROZESSES 323 (1842) (History of Roman Criminal Procedure).

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> No man can be judged a criminal until he be found guilty; nor can society take from him the public protection, until it has been proved that he has violated the conditions on which it was granted. What right, then, but that

the natural inference from the fundamental rule as ancient as the Roman law itself that the accuser has the burden of proving guilt. Until he has done so, society cannot treat the accused as a criminal. As mentioned above,[341] the French Declaration of the Rights of Men and Citizens reminded arresting officers that everyone is "presumed" innocent until proven guilty, and that therefore no unnecessary force should be used when making an arrest. In neither situation was there any intent to convey the impression that there was something like a technical presumption of innocence. On the contrary, the emphasis was on the fact that the burden of proof was on the accuser, and that respect for this rule demanded that before conviction an accused person should not be treated as if already convicted. The excesses of the inquisitorial process in the Middle Ages had perverted this rule into the contrary. When, after the reforms of the eighteenth and nineteenth centuries, the Roman rule that the accuser has the burden of proving guilt was again firmly established on the European Continent, there was no longer any need to refer to a presumption of innocence.

The situation was completely different in the Germanic legal system, to which the Anglo-Saxons and the Normans belonged. There the accuser did not have to prove the accusation.[342] But in order to force the defendant to answer and to go through the proof procedure, the plaintiff had to show some support of the accusation. This was, as Bracton explained,[343] *ut (actio) prima facie iusta videatur*, that the action should prima facie appear as a just one. Such a "prima facie case" or complaint-support was made in the Anglo-Saxon law by a fore-oath, in the Norman law by a complaint witness. After the Norman Conquest, the Anglo-Saxon fore-oath was replaced by complaint-witnesses, later called *secta* or *seute*--suit. But these complaint-witnesses or *secta* were not sworn, and they were not proof. They merely raised a presumption of guilt which could be defeated by the proof, *lex*, of the accused, *quia lex*

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> of power, can authorize the punishment of a citizen, so long as there remains any doubt of his guilt? . . . If his guilt is a certainty, he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary. If his guilt is not certain, an innocent person must not be tortured, for according to the law, a man is innocent whose crime has not been proved. Besides, it is confounding all relations to expect that a man should be both the accuser and accused . . . .

BECCARIA, DEI DELITTI E DELLE PENE, ch. XVI, 69-70 (1766) (Of Crimes and Punishments). An anonymous English translation, *An Essay on Crimes and Punishments* appeared in London in 1769.

[341] *See* note 334 *supra.*

[342] *See* Meyer, *supra* note 37, at 1147-49.

[343] 6 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE f. 400, at 154-55 (T. Twiss ed. 1883) [hereinafter cited as BRACTON].

*vincit sectam*, because the *lex* defeats the *secta*.[344] The *lex* was, of course, the same proof procedure which has been discussed in connection with the *lex terrae* in chapter 39 of the Magna Carta.[345] When the supported accusation was replaced by the indictment of the *inquisitio*—jury—this then raised a presumption of guilt, and the *indictatus* had to go to the proof in order to exculpate himself.[346]

In Germanic procedure proof was not made to the judges to convince them of the truth of the facts alleged in court. Proof was made to the adversary out of court.[347] The judgment was therefore not based on any conviction formed by the proof presented by the parties in court, as it was in Roman law, but strictly on the pleadings, and it was in the alternative, depending on the outcome of the formalistic ritual called *lex*, to be performed at a later date. Therefore there could be no rational decision of the judges based on the pleadings and the evidence before them as to whether or not a party had adequately discharged his burden of proof.

When, first in civil proceedings proof by *inquisitio*—jury—appeared,[348] it gradually replaced the formalistic methods of proof with a method to give a rationalistic answer—the verdict—to the question of fact. It also took control of the proof procedure away from the parties. The party entitled to proof by jury "put himself on the country," the *patria*. The law gave him no influence over the selection of the jurors; this was done first by the judge, later by another royal official, the sheriff, upon a royal writ. The jurors were supposed to base their verdict on their own knowledge.

Originally, unanimity of the jurors was not required for the verdict. Jurors who declared themselves as not knowing were replaced by other jurors.[349] But early in the thirteenth century cases began to appear in which jurors who confessed ignorance were punished, or panels who could not agree were locked up without food and drink.[350] The pressures for unanimous verdicts increased, but only in the second half of the fourteenth century was the principle established that in all inquests the twelve must agree in order to have a good verdict.[351]

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[344] *See* FLETA, FLETA SEU COMMENTARIUS IURIS ANGLICANI § 9, IV, 16 (Selden Soc'y ed. 1955). *See also* 6 BRACTON f. 400 b (9), at 158-59 ("*secta enim probationem non facit, sed levim inducit presumptionem, & vincitur per probationem in contrarium, & per defensionem per legem*"—a *secta* does not constitute proof, but it raises a slight presumption and it is defeated by a proof to the contrary and by a defense through law).

[345] *See* notes 35-36 *supra* and accompanying text.

[346] M. BIGELOW, *supra* note 31, at 292; *see* Meyer, *supra* note 37, at 1149-50; notes 37-39 *supra* and accompanying text.

[347] *See* Meyer, *supra* note 37, at 1147-51.

[348] 1 HOLDSWORTH 317; *see* Meyer *supra* note 37, at 1149-51.

[349] BRUNNER, SCHW. 364-71.

[350] J. DAWSON, A HISTORY OF LAY JUDGES 125-26 (1960) [hereinafter cited as DAWSON]; THAYER 86-90.

In the English common law courts the judges based their judgment on the verdict in almost the same formalistic way in which previously it had been based on the outcome of oath, combat, and ordeal.[352] Evidently they were not willing to assume the responsibility of determining the facts on which the judgment must rest[353] which in the Roman procedure was an essential part of the judges' task. Instead, they preferred to leave the fact finding to a group of laymen and made no attempt to find out how the jurors acquired their knowledge for their verdict.

Already in the thirteenth century the parties in civil proceedings began to insist on informing the jury, first by displaying documents, called evidence, and by having the parties' own witnesses made part of the jury,[354] finally, in about the sixteenth century,[355] by having their witnesses testify to the jury. But these were not the old witnesses of the Anglo-Saxon law.[356] They were witnesses of the Roman-canonical law who testified to the jury upon swearing the promissory oath to tell the truth and to testify as to what they had heard and seen.

However, for a long time, the jury did not have to pay any attention to the evidence introduced in court, so that the judge could not know on what knowledge the jurors had based their verdict. This point was made as late as 1670 by the jurors in *Bushell's Case*.[357] They had been fined and imprisoned for their "false" verdict. The Court of Common Pleas which heard the case on a writ of habeas corpus, agreed with their argument that the court could not know the evidence on which they had based their verdict, and discharged them. Although its judgment was later reversed on the ground that the case, being a criminal case, was not cognizable by the Court of Common Pleas,[358] the case nevertheless became a landmark for the principle that jurors could not be punished for their verdict, and for the rule that jurors had to tell the judge in advance what they knew. The development ended with the adoption of the principle of the Roman law for the jury that the verdict had to be based on what had been alleged and proved in court by the parties.

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[351] BRUNNER, SCHW. 370; DAWSON 125; THAYER 86.

[352] 3 HOLDSWORTH 616.

[353] DAWSON 126.

[354] THAYER 100-36.

[355] 1 HOLDSWORTH 334; THAYER 121.

[356] *See* Meyer, *supra* note 37, at 1148.

[357] [1670] Vaughan's Rep. 135.

[358] 1 HOLDSWORTH 345.

Another Roman idea penetrated into the common law courts, namely that the person who advances a claim or makes a positive assertion should have the burden of proving it. Outside of the common law courts it had been known in England since the thirteenth century. For instance in *Fleta*, written about 1290, it is mentioned that by the grace of the prince, in cities and fairs and among merchants, it is granted that proof shall be the privilege of the party asserting the claim, in accordance with the law of merchants.[359] It was also known in the admiralty courts which operated under the civil law system and, of course, in the ecelesiastical courts and in equity procedure.[360] It was therefore a logical development that the principle became accepted in the common law courts after the petit jury had changed from an instrument of proof into an instrument of judgment, thus permitting the Roman methods of making proof to complete the replacement of the ancient Anglo-Saxon proof system.

With the adoption of the Roman rule that the plaintiff must prove his "affirmation," there began to appear statements that in the eyes of the law every man is honest and innocent, unless it be proved to the contrary. The earliest statement of this kind seems to have been made in 1657 by the General Court–the Legislature–of Massachusetts.[361] However, cases in the common law which seriously consider the question of burden of proof and its companion, the presumption of innocence, are of fairly recent date, rarely occurring before the nineteenth century.[362] Equally recent is the adaptation of the Roman rule that an accusation does not raise a presumption of guilt. For instance, in 1772 an English statute[363] provided that if any person being arraigned on any indictment or appeal for felony, or on any indictment for piracy, shall stand mute, the court shall award judgment and execution against such person in the same manner as if he had been convicted by verdict or confession. It was not until 1827 when another statute[364] directed that if any person, being arraigned for treason, felony, piracy, or misdemeanor, shall stand mute of malice or will not answer directly, it shall be lawful for the court to order the proper officer to enter a plea of not guilty.

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[359] Fleta, *supra* note 344, § 10, II, 63.

[360] *See* Thayer 364 n.2. *See also* C. Langdell, Equity Pleadings 1-26 (2d ed. 1883).

[361] "Whereas, in all civil cases depending in suit, the plaintiff affirmeth that the defendant has done him wrong and accordingly presents his case for judgment and satisfaction–it behoveth the court and jury to see that the affirmation be proved by sufficient evidence, else the case must be found for the defendant; and so it is also in a criminal case, for, in the eye of the law every man is honest and innocent, unless it be proved legally to the contrary." Records of Massachusetts iii, 434-35, *reported by* Thayer 552.

[362] *Cf.* J. Stephen, A Digest of the Law of Evidence 183 (9th ed. 1911); Thayer 353-89, 554.

[363] 12 Geo. 3, c. 20 (1772).

For the United States, Church[365] reports many early state cases in which it was held that for purposes of admission to bail, the indictment or information creates a presumption of guilt. For modern criminal trials in American jurisdictions, the courts have finally developed the rule that the burden is on the prosecution to prove each material element of the offense charged, and that the burden remains on it from the beginning to the end of the trial.[366] But then common as well as statute laws provided for so many presumptions and inferences by which the defendant was required to introduce proof, called by the courts "the burden of going forward with the evidence," that this had to cause confusion in the minds of the jury. Best known among such presumptions are those which make mere proof of possession of certain objects, such as gambling devices or narcotics, sufficient proof to authorize conviction unless the defendant explains such possession to the satisfaction of the jury.[367] It simply is impossible for a jury to understand why on the one hand the prosecution is supposed to have the burden of proving every material element of the offense charged from the beginning to the end, but may at the same time stop short of doing so and place the burden of bringing in further proof on the defendant.[368] If the judge

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[364] 7 & 8 Geo. 4, c. 28 (1827).

[365] W. Church, A Treatise on the Writ of Habeas Corpus §§ 403a-416, at 640-54 (2d ed. 1893).

[366] 1 F. Wharton, Wharton's Criminal Evidence § 10, at 19 (12th ed. 1955).

[367] *See* 21 U.S.C. §§ 844, 885 (1970) ("burden of going forward with evidence" on defendant with respect to possession of certain controlled substances); D.C. Code Ann. § 22-1502 (1967) (possession of gambling devices presumed to be "knowing possession").

[368] *See* Smith v. United States, 273 F.2d 462, 466 (10th Cir. 1959). The following language appears in *Smith*:

> We find no merit in defendant's contention that the court's instructions to the jury did not clearly require that the guilt of the accused must be established beyond a reasonable doubt. The defendant refers to statements in the instructions in which the court, in referring to several different counts, used the phrase "if the evidence indicates" that the defendant had possession of narcotics, such possession would be sufficient to sustain conviction unless the defendant explained such possession to the satisfaction of the jury. Preceding this statement in each of the instructions complained of, the court was careful to state that the facts required to establish the guilt of the defendant must be found "beyond a reasonable doubt." The language that possession of narcotics or marijuana, and the absence of appropriate taxpaid stamps made a prima facie case and would authorize conviction unless the defendant explained such possession to the satisfaction

then tells the jurors that if there is any doubt left in their minds, they must resolve it in favor of the accused because of the presumption of innocence, this may be in most cases the only thing the jury can really understand. It is therefore understandable why in American jurisdictions so much emphasis has been placed on a presumption of innocence. But, as Wigmore explained so well,[869] that phrase is nothing more than another form of saying that it is for the prosecution to adduce evidence and to produce persuasion beyond a reasonable doubt, and that the term also conveys a useful hint to the jury that they should disregard any suspicion which might have arisen from the arrest, the indictment and the arraignment, and reach their conclusion solely from the evidence adduced before them at the trial.

Unfortunately, there are indications that the presumption of innocence might be subjected to a misuse similar to that of due process of law. Therefore it is necessary to state that as a legal term the celebrated phrase makes no sense. In the much cited case of *Coffin v. United States,*[870] the Supreme Court said that the "presumption of innocence is evidence in favor of the accused introduced by law in his behalf." [871] This has been rightly criticized as an "aberration" and was abandoned.[872] A document or testimony may be evidence, but a presumption can only be a rule of proof. In the *Coffin* case the Court seemed to derive the idea that the presumption of innocence is evidence in favor of the accused from the erroneous assumption that the phrase was recognized by "the civilians as a presumptio iuris." [873]

As explained above,[874] in the Roman and civil law system a *praesumptio iuris* is an exception to the regular rule of proof that the person who makes an allegation has the burden of proving it, in that it throws the burden of proving an allegation on the person who denies it. Where, as in the Roman law, the regular rule is that the accuser has the burden of proving his allegation, there is no room for any presumption to relieve him of this burden. Any presumption of innocence in such a

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> of the jury was in conformity with [the applicable statutes]. It did not detract from the instruction that the necessary elements of the crime must be found beyond a reasonable doubt.

*Id.* at 466; *see* Act of Feb. 9, 1909, ch. 100, § 2, 35 Stat. 614, *repealed*, Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. III, §§ 1101(a)(2)-(4), 84 Stat. 1291.

[869] *See* note 330 *supra.*

[870] 156 U.S. 432 (1895).

[871] *Id.* at 460.

[872] *See* Holt v. United States, 218 U.S. 245, 254 (1910); 9 J. WIGMORE, *supra* note 330, at § 2511, at 409 n.4 (3d ed. 1940).

[873] 156 U.S. at 460.

[874] *See* notes 335-336 *supra* and accompanying text.

situation would be meaningless. However, where, as in the Germanic legal system and in the early common law, the regular rule was that the accuser did not have to prove his accusation,[375] then the mere accusation raised a suspicion or a presumption of guilt from which the accused had to clear or acquit himself by a ritual called "proof." The emphasis on the presumption of innocence in the common law world can only be explained as a counter action against long established ideas when the common law system underwent a complete reversal with respect to the modes of proof.[376] It then became necessary to impress upon the jury that the indictment alone did not raise a presumption of guilt, but that the accused must be presumed innocent until conviction.

Since the presumption of innocence is not a real presumption or any other legal term, it is not very likely that such knowledgeable men as the framers of the United States Constitution would have elevated it into a constitutional provision. The text of the Constitution does not mention it. Yet, it has been claimed that it is part of the due process clause, and recently Justice Black even wanted to read it into the fifth and sixth amendments to the Constitution. In his dissenting opinion in *Turner v. United States*,[377] in which Justice Douglas joined, he objected strongly to the Court's affirming a conviction in a case in which the respondent had been charged with receiving, concealing, and facilitating the transportation and concealment of heroin while knowing that the heroin had been unlawfully imported into the United States.[378] The prosecution had proved only possession of heroin, but none of the statutory elements of the crime with which Turner had been charged. It relied on the statutory provision which permitted conviction upon proof of possession only.[379] The Court's majority found that, with respect to heroin, guilt could be inferred from proof of possession alone because no heroin was commercially produced in the United States.[380] Justice Black was of the opinion that the Constitution requires that the defendant in a criminal case be presumed innocent until he is proved guilty, and that it places the burden on the Government to prove beyond a reasonable doubt each essential element of the alleged offense. "This basic principle," said Justice Black, "is clearly reflected in several provisions of the Bill of Rights."[381] Here Justice Black was untrue to himself. He was on safer grounds in the *Winship*[382] case, decided only two months after *Turner*, where he said that the Constitution contains no provision requiring proof of guilt beyond a reasonable doubt.[383]

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[375] *See* notes 342-346 *supra* and accompanying text.

[376] *See* notes 342-362 *supra* and accompanying text.

[377] 396 U.S. 398, 425 (1970) (Black, J., dissenting).

[378] *See* Act of Feb. 9, 1909, ch. 100, § 2, 35 Stat. 614, *repealed*, Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. III, §§ 1101(a)(2)-(4), 84 Stat. 1291.

[379] *Id.*

[380] 396 U.S. at 417. The Court reached a different result with respect to cocaine. *Id.* at 422-23.

In this case Justice Black was right. Nowhere does the Constitution state that conviction of a crime requires proof of guilt beyond a reasonable doubt, nor is there any language referring to a presumption of innocence. Wisely, the framers included in the Constitution only certain fundamental principles and left the legislatures free to legislate with respect to details. Nowhere in the Constitution is the Supreme Court given power to create new constitutional rules at will, as for instance the exclusionary rule,[384] or the requirement of proof beyond a reasonable doubt,[385] and to deprive the legislatures of their constitutional mandate to legislate in accordance with the Constitution.

According to the clear language of the Constitution, the so-called presumption of innocence is not a part of any of its provisions. Only when, for instance, a particular jurisdiction uses that phrase to define a particular standard of proof for criminal trials, then the due process clause conmmands that every criminal trial in that jurisdiction must adhere to that standard. Otherwise the phrase means no more than a reminder to arresting officers and other officials, as well as to the jury, that an indictment does not raise a presumption of guilt and that until conviction a defendant should be treated differently from those already convicted.

## EQUAL PROTECTION

It has been alleged that the new pretrial detention statute denies citizens of the District of Columbia the equal protection of the laws by subjecting them to a system of pretrial detention not applicable to other persons charged with crime. It must be made clear that the equal protection clause of the fourteenth amendment applies only to the states and not to Congress.[386] However, the question may be asked whether the due process clause of the fifth amendment which does apply to

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[381] *Id.* at 428.

[382] *In re* Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting).

[383] Justice Black pointed out that "nowhere in [the Constitution] is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt. . . . I believe the Court has no power to add or subtract from the procedures set forth by the Founders." *Id.*

[384] Mapp v. Ohio, 367 U.S. 643, 648 (1961).

[385] *In re* Winship, 397 U.S. 358, 367 (1970).

[386] Wight v. Davidson, 181 U.S. 371, 384 (1901); *cf.* notes 306-308 *supra* and accompanying text.

Congress permits it to make procedural rules for the District which differ from those for the rest of the nation.

The differences between the District of Columbia and the rest of the nation have been created by the Constitution itself. The political and legal structure of the District of Columbia is fundamentally different from that of individual states. While the United States Constitution has strictly limited the legislative power which Congress may exercise within the boundaries of the states, it has given to Congress complete legislative control over the District of Columbia, for every purpose of government, national as well as local.[387] Article one, section eight, clause 17, provides that Congress shall have power "to exercise exclusive legislation in all cases whatsoever" over the District and to exercise like authority over all places purchased by the consent of the legislature of the state in which such places are situated.

It has been held that such power "is sweeping and inclusive in character, to the end that Congress may legislate within the District for every proper purpose of government." [388] When legislating for the District or for federal enclaves, Congress does not act as a local legislature, "but exercises this particular power, like all its other powers, in its high character as the legislature of the Union. . . . Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution." [389]

The United States Court of Appeals for the Third Circuit observed that under its plenary jurisdiction over the District of Columbia "Congress has the power to prescribe a rule in respect to intercepting wire or radio communications within the District of Columbia different in character than that prescribed for the rest of the United States." [390] While this is only dictum, there are a number of decisions which support this observation that Congress may make rules for the District which differ from those applicable in like situations to the rest of the nation.

Thus, the Supreme Court has repeatedly recognized that under its plenary power to legislate for the District, Congress may confer on the federal courts of the District powers which other federal courts do not possess, such as jurisdiction over nonfederal causes of action, or over quasi-judicial or administrative matters.[391] Similarly, the Supreme Court has recognized as constitutional geographic differences in the treatment of crimes committed in federal enclaves. Acting under the same constitutional authority of article one, section eight, clause 17, which gives Congress plenary legislative power over the District of Columbia as well as over federal enclaves, Congress enacted the Assimilative Crimes Act,[392] which adopted for each federal enclave the criminal laws of the state, territory, or district in which such enclave is situated. Thereby Congress adopted a wide variety of ways in dealing with offenses committed under its jurisdiction, depending on the geographic locality where the offense was committed.

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[387] Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428-29 (1821); Neild v. District of Columbia, 71 App. D.C. 306, 310, 110 F.2d 246, 250 (1940).

[388] Neild v. District of Columbia, 71 App. D.C. 306, 309, 110 F.2d 246, 249 (1940); *accord* O'Donoghue v. United States, 289 U.S. 516, 539 (1933); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434-35 (1932); Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899); Stoutenburgh v. Hennick, 129 U.S. 141, 147 (1889); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 619 (1838).

[389] Cohens v. Virginia, 19 U.S. (6 Wheat.) 246, 249 (1821); *see* Kendall v. United States, 37 U.S. (12 Pet.) 524, 619 (1838). *See also* Glidden Co. v. Zdanok, 370 U.S. 530, 581 (1962); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434-35 (1932).

[390] Sablowsky v. United States, 101 F.2d 183, 188 (3d Cir. 1938).

The Supreme Court has upheld the constitutionality of the Assimilative Crimes Act and has ruled that as Congress may validly adopt a criminal code for each federal enclave, "[i]t certainly may do so by drafting new laws or by copying laws defining the criminal offenses in force throughout the State in which the enclave is situated." [393]

It is obvious that if Congress, under its special constitutional mandate, can enact different criminal laws in different enclaves, it certainly has power under the same mandate to prescribe rules for the District of Columbia in dealing with persons arrested for a criminal offense which differ from those in other federal jurisdictions. Thus, the Supreme Court has upheld a statute applicable to the District which provided for a mandatory death penalty for murder although the federal statutory provision applicable to murder committed in federal enclaves generally allowed the jury to qualify its verdict by adding the words "without capital punishment." [394] In *Griffin v. United States*,[395] the Supreme Court upheld the power of the courts of the District to create different rules of evidence in criminal cases from those which applied in the federal courts generally. The courts of appeals which have considered claims of denials of equal protection arising from distinctions between general federal law and statutes operating in the District of Columbia alone have followed the Supreme Court and have ruled that the due process clause of the fifth amendment is satisfied if all residents of the District are treated alike.[396]

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[391] *See, e.g.*, Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 236-37 (1949); O'Donoghue v. United States, 289 U.S. 516, 545 (1933); Keller v. Potomac Elec. Co., 261 U.S. 428, 435 (1923).

[392] 18 U.S.C. § 13 (1970).

[393] United States v. Sharpnack, 355 U.S. 286, 293 (1958).

[394] Johnson v. United States, 225 U.S. 405 (1912).

[395] 336 U.S. 704, 712-13 (1949).

Another area in which Congress has previously exercised its plenary power to legislate for the District was that concerning defendants acquitted of criminal cases by reason of insanity. The decision of the United States Court of Appeals for the District of Columbia Circuit in *Durham v. United States*,[397] alarmed Congress because of the prospect of a sharp increase in the number of insanity acquittals and release onto the streets of those acquitted. In order to protect the public safety, Congress, therefore, provided for the mandatory commitment to a mental hospital until recovery of all defendants who raised the defense of insanity and gained an acquittal on this ground, a commitment which can be indefinite.[398] This was done by the Congress notwithstanding the fact that in all other federal jurisdictions a defendant, not convicted of criminal charges in a federal court because of his insanity, is automatically released by the courts unless the state authorities decide to institute civil commitment proceedings.[399]

With respect to pretrial detention, Congress could have made the pretrial detention provisions uniform for the whole nation. But it chose not to do so. There was good reason for making them applicable only to the District, in the same way that there was good reason for making the mandatory commitment procedures following insanity acquittals applicable only in the District of Columbia. For only in the District does Congress exercise legislative authority in the same manner a state does over its own territory, and only in the nation's capital does the federal government, therefore, prosecute the full range of common law street crimes of violence.[400]

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[396] *See, e.g.*, United States v. Horton, 423 F.2d 474, 476-77 (4th Cir.), *cert. denied*, 399 U.S. 932 (1970); Gilstrap v. Clemmer, 284 F.2d 804, 808-09 (4th Cir. 1960); Neild v. District of Columbia, 71 App. D.C. 306, 316-18, 110 F.2d 246, 256-58 (1940); Sims v. Rives, 66 App. D.C. 24, 30-31, 84 F.2d 871, 877-78, *cert. denied*, 298 U.S. 682 (1936).

[397] 94 U.S. App. D.C. 228, 214 F.2d 862 (1954).

[398] *See* D.C. CODE ANN. § 24-301 (Supp. IV, 1971); H.R. REP. No. 892, 84th Cong., 1st Sess. 13 (1955); S. REP. No. 1170, 84th Cong., 1st Sess. 13 (1955).

[399] Congress specifically provided that its 1955 legislation "shall supersede in the District of Columbia the provisions of any federal statutes or parts thereof inconsistent with this section." D.C. CODE ANN. § 24-301(h) (Supp. IV, 1971).

[400] The significance of this responsibility for common law street crimes was pointed out in the Report by the House Committee on the District of Columbia.

> The required release of dangerous defendants prior to trial has had its greatest impact in the District of Columbia, for only in the Nation's Capital does the federal government prosecute the full range of common law street crimes such as rape, robbery, and burglary . . . . The rise of such crime in the District since the enactment of the Bail Reform Act has been appalling. Comparing the first six months of 1966, which preceded the Act's

The distinctions between the District and the rest of the nation are therefore not merely geographic distinctions. Rather, they are rooted in the Constitution itself, which has given Congress plenary power to deal with those distinctions. The new legislation relating to pretrial release and detention was enacted in proper exercise of this power. It is neither arbitrary nor injurious in character. If considered in the light of the above cited court decisions, the new provisions regulating pretrial detention in the District of Columbia cannot be said to violate the equal protection contained in the due process clause of the fifth amendment, namely that all persons must have equal access to the regular procedure in their jurisdiction.[401]

## SUMMARY

In his dissenting opinion in *Coolidge v. New Hampshire*,[402] Justice Black pronounced a very important truth. He said: "The framers of the Constitution, and the people who adopted it, must be understood to have used words in their natural meaning, and to have intended what they said." [403]

In the foregoing discussion, it has been shown that if constitutional terms which have been called "ambiguous" like the excessive bail

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> passage, to the comparable six month period of 1969, three years later, the number of reported robberies more than tripled from 1,466 to over 5,000, and the number of rapes and burglaries more than doubled from 69 to 150 and 4,464 to over 10,000 respectively. In Washington, the only major city in which likelihood of flight is the sole criterion of pretrial release, the rate of serious crimes in the first half of 1969 increased thirty-seven percent over the first half of 1968 compared to only a thirteen percent national increase. This is not to suggest that the increase is solely attributable to the Bail Reform Act, but Chief Wilson of the Metropolitan Police Department testified in hearings on the crime bills that the effect of pretrial release was having a significant effect on crime statistics.

H.R. REP. No. 907, 91st Cong., 2d Sess. 89 (1970).

[401] In *United States v. Thompson*, the United States Court of Appeals for the District of Columbia Circuit, with Circuit Judge Wright speaking for the court, in a case involving the availability of bail on appeal, said that it would have to hold the District of Columbia bail provisions unconstitutional if meant to apply also to federal offenses under title 18 of the *United States Code*, and not only to local offenses under the *District of Columbia Code*. — U.S. App. D.C. —, —, 452 F.2d 1333, 1341 (1971), *cert. denied*, 40 U.S.L.W. 3456 (U.S. Mar. 20, 1972). Therefore, he preferred to misread that statute which provides clearly that "[t]he term 'offense' means any criminal offense committed in the District of Columbia" other than offenses triable by a military tribunal. D.C. CODE ANN. § 23-1331 (Supp. IV, 1971). The decision is at odds with the above cited previous decisions. *See* note 396 *supra*.

[402] 403 U.S. 443, 493 (1971) (Black, J., dissenting).

[403] *Id.* at 500.

clause,[404] or "elusive" like the due process clause,[405] are traced from their historical origin to the time of their inclusion in the Federal Constitution, their meaning becomes clear, and they are neither "ambiguous" nor "elusive." Perhaps not surprisingly, one finds a confirmation of Justice Black's pronouncement, namely that they mean exactly what they say, and that the framers intended them to mean just that.

If, then, the constitutional concepts are construed in accordance with the natural meaning of their language and in their historical setting, it is not difficult to show that the provisions regulating pretrial detention in the District of Columbia Court Reform and Criminal Procedure Act of 1970 are not in conflict with the Constitution. These provisions permit a judicial officer to detain without bail up to 60 days prior to trial certain categories of dangerous defendants after a hearing and on carefully specified conditions. The law expressly excludes money bail in such cases.[406]

The question is whether Congress can constitutionally deny pretrial release on bail to persons arrested for a crime. The United States Constitution says nothing about a right to bail. The only provision mentioning bail is the eighth amendment which says that "[e]xcessive bail shall not be required." If these words are construed in accordance with their natural meaning, there is only one conclusion possible—the excessive bail clause is a command to the judges not to thwart an individual's right to release on bail by imposing excessive bail in cases in which the law provides for release on bail.

History fully supports this conclusion.[407] The excessive bail clause was taken from clause ten of the English Bill of Rights of 1689. The clause was the final step in a long fight against the prerogative of the King to imprison a person without informing him of the cause of his arrest.[408] Thus the prisoner was unable to answer to the charges, because he did not know them, and to have a trial. The purpose of the Habeas Corpus Act was to assure all those not plainly committed for felony or treason to obtain a quick judicial review of the cause of the arrest so that those who under the law were bailable could be admitted to bail. By imposing excessive bail, the judges had made the Act inoperative with respect to prisoners whom the King did not wish to release. The answer was the excessive bail clause in the English Bill of Rights. It is no accident that these three connecting points, the right to be informed of the nature and cause of the accusation, the writ of habeas corpus, and the prohibition of excessive bail have all been included in the Constitution.

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[404] *See* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 965, 986 (1965).

[405] *See* note 2 *supra* and accompanying text.

[406] *See* D.C. CODE ANN. §§ 23-1301 to -1332 (Supp. IV, 1971).

[407] *See* Meyer, *supra* note 37, at 1180-94.

[408] *See id.* at 1180-87.

It must be borne in mind that at that time the writ of habeas corpus was an extraordinary remedy to obtain quick judicial review of the legality of an arrest, and its most important remedy was release on bail.[409] This could easily be thwarted by the imposition of excessive bail. It seems logical that the framers of the Constitution also wanted a constitutional clause prohibiting the imposition of excessive bail in order to prevent a repetition of the English experience and to assure release on bail in all cases where the law permitted it.

It is, however, clear from the history of the American Bill of Rights that the framers did not wish to freeze an inflexible right to bail into the United States Constitution,[410] because none of the proposals for the amendment of the Constitution made by the states or by important statesman suggested a constitutional right to bail, although a number of them suggested an excessive bail clause. Accordingly, Congress, almost simultaneously, enacted a statutory right to bail in noncapital cases in the Federal Judiciary Act of 1789, but included only the excessive bail clause in the Constitution.[411]

It has been claimed that the eighth amendment guarantees a right to bail by implication.[412] Had Congress believed this at the time of its adoption, it could not possibly have failed to notice the glaring incompatibility between the language of the eighth amendment and that of the bail provision of the Judiciary Act. The statute permits denial of bail in capital cases, the eighth amendment provides for no exceptions. The statutory provision would thus have been unconstitutional from the start, a fact which Congress could hardly have overlooked. The truth is simply that Congress did not intend, nor did it in fact create, any constitutional right to bail, and the proposals made by the states and their subsequent ratification without objection show that they were in complete agreement.

It has also been argued that the provision forbidding excessive bail would be futile if Congress were free to legislate away the right to bail. The significance of the provision forbidding excessive bail must be judged in relation to the institutions at the time it was written. At that time the only way for a person arrested for a crime to gain freedom pending trial was release on bail. Since then, Congress has enacted the Bail Reform Act of 1966,[413] enabling arrested persons to obtain pretrial release without bail. Undoubtedly, these measures have diminished the importance of the constitutional provision forbidding excessive bail. Congress could even do what European democracies have done. They have largely rejected the bail system entirely because of its unfairness to poor people;[414] criminal prosecution usually begins with a summons; arrests are made only when necessary to prevent flight or suppression of evidence, and in some jurisdictions also in cases of danger to other persons or if there is danger that the accused may commit another crime. The eighth amendment does not prevent Congress from enacting altogether new provisions concerning detention before trial of criminal suspects, as Congress has done with the pretrial detention provisions under discussion. It is not so much the bail system with which the Bill of Rights is concerned but under what circumstances the Government may deprive an individual of his freedom.

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[409] *See id.* at 1186-90.

[410] *See id.* at 1190-94.

[411] *See id.* at 1194.

[412] *See id.* at 1178-80.

The fifth amendment says explicitly that no person shall be deprived of his liberty without due process of law. Consequently, if Congress enacts a new statute which provides for deprivation of liberty, it must respect the constitutional guarantee of due process of law. It is therefore important to define the constitutional meaning of due process of law.

According to pronouncements in Supreme Court decisions of more recent date, due process is undefinable, elusive, and varies in each individual case.[415] However, this impossibility of defining due process is of the Supreme Court's own making. The cause of this difficulty has been attributed to the influence of natural law.[416] Its principles found their way into many European and American laws and constitutions. But instead of looking at those instruments as the embodiment of such natural law principles as the framers had wished to codify, American courts came to treat natural law as a higher law which commanded the conscience of the judges to declare statutes void whenever, in their judgment, they were in conflict with fundamental principles of justice and equity, although they were not in conflict with any provision of the Constitution of the United States or of a state. Neither the Constitution of the United States nor that of any state vested such a power in any of the courts. Beginning in 1896, the Supreme Court began to use the due process clause of the fourteenth amendment for such unauthorized purposes.[417] From then on the Supreme Court arbitrarily changed the meaning of due process in each individual case. Thus the Court declared it to stand for the protection of vested rights, just compensation, freedom of contract, freedom to teach foreign languages, freedom of private instruction of school children, liberty of the press and of speech, the right of peaceable assembly, the exclusion of evidence, and many other rights. In short, due process became undefinable because, according to the Supreme Court, it meant everything and nothing.

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[413] *See id.* at 1165-66.

[414] *See* notes 459-491 *infra* and accompanying text.

[415] *See* notes 2, 324-325 *supra* and accompanying text.

[416] *See* notes 200-204 *supra* and accompanying text.

As might have been expected, the destruction of the constitutional meaning of due process in the fourteenth amendment influenced the meaning of the original due process clause in the fifth amendment. Originally courts had held that due process in the fourteenth amendment meant the same as due process in the fifth amendment. Later they began to hold that due process in the fifth amendment meant the same as the same words in the fourteenth amendment, and they began to cite fourteenth amendment cases as authority for the fifth amendment. Since the judges base their determination as to what is due process in any given case on what "shocks the conscience," offends "a sense of justice" or "the community's sense of fair play and decency," [418] it is not possible to predict whether a state or federal statute or the decision of a state or lower federal court will meet the subjective standards of five Supreme Court Justices. Thus it is clear that any attempt to define or explain due process of law in the light of more recent Supreme Court decisions must fail, because the Supreme Court has deprived the clause of any meaning and has been using it as a constitutional cloak to proclaim at will new constitutional rules not contemplated by the Constitution.

It is equally clear that the only possible way of defining and explaining a term used by the Constitution is first by its language, second through its history, and third through the understanding of the people who framed, accepted and first lived by it. The words "by due process of law" were first used by Edward III in 1354 as a substitute for the words *per legem terrae* in chapter 39 of the Magna Carta of 1215. Both terms were procedural. The *lex terrae* was a Norman term for the old Germanic formalistic proof procedure to which every freeman was entitled.[419] Due process of law was meant to include new forms of procedure which had developed later and to apply in general to the applicable regular procedure. Both terms meant essentially the same thing, a promise by the King that a person could not be deprived of his life, liberty or property without being assured of the regular procedure applicable to his case. This guarantee was of such importance because institutions like the writs of execution of King John or, later, bills of attainder of the British Parliament had cut off the individuals concerned from the regular procedure and sentenced them to death, imprisonment, and forfeiture of property without giving them an opportunity to answer and make proof.

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[417] *See* notes 210-305 *supra* and accompanying text.

[418] *See* note 321 *supra* and accompanying text.

[419] *See* notes 27-46 *supra* and accompanying text.

At the time of the adoption of the Constitution, bills of attainder were evidently still feared by the framers, for they found it necessary to include in the Constitution express provisions prohibiting not only Congress, but also the states from passing any bill of attainder. The due process clause of the fifth amendment is an additional guarantee that no one can be deprived of his life, liberty and property without having access to the regular procedure applicable to his case. That this is the meaning of due process becomes especially clear with respect to deprivation of life. It is unthinkable today that the Government could constitutionally put a person to death without giving him access to the regular procedure prescribed by law. The Constitution intended to give the same guarantee in case of deprivation of liberty and property.

This understanding appeared in the decisions of the Supreme Court for more than a hundred years. Almost all of these decisions came after the advent of the fourteenth amendment because litigants claimed that the privileges and immunities clause and the due process clause in the fourteenth amendment had made the entire Bill of Rights applicable to the states. For a long time the Supreme Court has consistently held that it is clear from the language of the fourteenth amendment that the privileges and immunities clause referred to those privileges and immunities connected with national citizenship mentioned in article four, section two of the Constitution, and that the only provision in the fourteenth amendment which was taken from the Federal Bill of Rights is the due process clause of the fifth amendment and nothing else, and that the due process clause of the fourteenth amendment means the same as the same words in the fifth amendment. The Court saw clearly that due process of law standing alone adds nothing to the Constitution, but that it refers in the fifth amendment to the procedure prescribed by the Constitution and by Congress acting within constitutional limits, and in the fourteenth amendment to the process regulated by the states within their respective constitutional limits, and that due process is secured by such laws operating on all alike in the regular course of administration through the courts.[490]

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[490] *See, e.g.*, Frank v. Mangum, 237 U.S. 309, 326 (1915); Maxwell v. Dow, 176 U.S. 581, 587 (1900); Leeper v. Texas, 139 U.S. 462, 467-68 (1891); *In re* Kemmler, 136 U.S.

It is thus clear that the constitutional meaning of due process is not difficult to define. As its language implies, as it was understood through its long history and as it was defined by the Supreme Court during the first hundred years of its constitutional life, it means access to the regular procedure due to all alike under the applicable federal and state laws.

Since the District of Columbia Court Reform and Criminal Procedure Act of 1970[421] is a federal statute, there can be no controversy concerning the applicability of the Federal Bill of Rights. It applies in its entirety. On the federal level therefore, any inquiry into due process must necessarily take into consideration the procedural provisions of the Federal Bill of Rights.

The provisions regulating pretrial detention in the District of Columbia presuppose, of course, that there was a lawful arrest. The Constitution, in the fourth amendment, permits arrest upon probable cause, but it says nothing as to how long a lawfully arrested person may be held, except that it provides in the fifth amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on an indictment of a Grand jury." The Constitution does not specify how long a person so arrested may be held without an indictment. It leaves this to legislation or court interpretation. Nor does the Constitution say how long a person may be held after indictment. It does, however, guarantee a speedy trial, again leaving it to legislation or court interpretation to prescribe what may be considered as speedy.

Const. itself

Consequently, the Constitution leaves Congress free to legislate in which cases release may be granted with or without bail and in which cases release may be denied, as well as how long a person may be held to await the indictment of the grand jury or his trial. For the District of Columbia, Congress has declared that a person charged with a criminal offense may be held nine months to await grand jury action. If after nine months the grand jury has taken no action on the case, the accused, if in custody, must be set free; if held to bail, his bail must be discharged.[422] The Supreme Court has held that the statute acts upon persons committed to prison and upon those not incarcerated but only held to bail, but that it did not repeal or modify the statute of limitations. Evidently, neither the Supreme Court[423] nor the United States

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436, 446-49 (1890); Hurtado v. California, 110 U.S. 516, 534-35 (1884); Walker v. Sauvinet, 92 U.S. 90, 93 (1875).

[421] D.C. CODE ANN. §§ 23-1321 to -1332 (Supp. IV, 1971).

[422] *Id.* § 23-102. This provision was reenacted in 1970 as part of the D.C. Court Reform and Criminal Procedure Act.

[423] United States v. Marion, 404 U.S. 307 (1971); United States v. Cadarr, 197 U.S. 475 (1905).

Court of Appeals for the District of Columbia Circuit[424] considered a detention of nine months before indictment so unreasonably long as to violate any due process rule contemplated by the Constitution. In view of this, pretrial detention of 60 days provided for by the District of Columbia Court Reform and Criminal Procedure Act of 1970 can certainly not be considered unreasonable, whether before or after indictment.[425] It is clear then that the Constitution permits arrest and detention before trial, and that Congress may regulate by statute the conditions of pretrial release and detention.

Due process has never required that everyone charged with a crime must be arrested, nor that everyone must be released. Therefore Congress could constitutionally establish categories among such persons regarding their detention or release upon arrest for a crime. In the beginning, the criterion chosen by Congress was simple—those charged with a noncapital crime had a right to release on bail, those charged with a capital crime did not. The judges were left free discretion to determine the amount of bail, their own limitation being the eighth amendment to the Constitution. Experience showed that this mechanical categorization resulted in a very unequal treatment of arrested persons depending on whether or not they had the means to pay for bail. To relieve this situation, Congress, in the Bail Reform Act of 1966,[426] created new categories among those eligible for release, whereby the judicial officer was permitted to release certain persons without bail if they met certain individualized criteria.

The Bail Reform Act of 1966 applied to all federal crimes in the entire nation, but only in the District of Columbia did it apply also to what is commonly called state crimes. Therefore the express provision of that Act that, in determining conditions of release, a judicial officer may in noncapital cases before conviction consider only danger of flight and not the defendant's danger to the community, created special problems in the District. To meet such problems with imposition of high bail, as often was done,[427] constituted a disregard of the prohibition of the eighth amendment and certainly a very unequal treatment of the rich and poor. Thus, in the District of Columbia Court Reform and Criminal Procedure Act of 1970, Congress found it necessary to add new categories to those already existing, providing for detention without bail of up to 60 days of certain persons considered dangerous if a number of specified conditions are met. In order to determine whether a person arrested for a crime falls within a category for which pretrial detention in noncapital cases has been authorized, the new law requires a hearing in which the defendant is entitled to representation by counsel and at the conclusion of which the judicial officer must make specified findings that all the statutory requirements have been complied with.[428]

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[424] *See* Arnstein v. United States, 54 App. D.C. 119, 296 F. 946, *cert. denied*, 264 U.S. 595 (1924).

[425] D.C. CODE ANN. §§ 23-1322 to -1324 (Supp. IV, 1971).

[426] 18 U.S.C. §§ 3041, 3141-43, 3146-52, 3568 (1970).

[427] *See* Meyer, *sura* note 37, at 1142-45.

Before the enactment of this Act, the question of whether or not a person had met the conditions of a particular category was left largely to the discretion of the judicial officer. No claim has ever been made that this violated due process. Of course, it did not, since the Constitution prescribes no particular procedure for this purpose. Therefore, if the new Act provides for a particular procedure in order to guard against any possibility that a person not coming within the definitions of the categories in question might be subjected to pretrial detention, it did more than the Constitution required. In doing this, Congress undoubtedly wished to forestall possible objections that in a system, which in principle releases persons arrested for noncapital offenses before trial, the detention of a specified group could be considered arbitrary and therefore violative of due process unless it was accorded a hearing and finding by the judicial officer that the statutory exceptions were met.

The pretrial detention hearing is not a substitute for either an indictment or a trial. As the Constitution contains no provision prescribing the kind of evidence on which grand juries must act,[429] it also contains no provision prescribing the kind of evidence on which an arrested person may be held for the grand jury or to answer upon an indictment. Again this is left to statutory regulation. In conformity with the Bail Reform Act of 1966,[430] Congress provided in the new statute that either side may present evidence at this hearing by proffer and that such information need not conform to the rules pertaining to the admissibility of evidence in a court of law.[431] The defendant has a right to appeal from an order of detention.

Claims that the pretrial detention provisions violate the sixth amendment's right of an accused to have assistance of counsel are refuted by the Act itself, as well as by court decisions. Courts have held that where an incarcerated defendant has competent counsel who has adequate time to prepare his defense, the constitutional requirement is satisfied and there is no violation of due process.[432]

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[428] *See id.* at 1140-42.

[429] Costello v. United States, 350 U.S. 359, 362 (1956).

[430] 18 U.S.C. § 3146(f) (1970).

[431] D.C. CODE ANN. §§ 23-1322(b)(2)(C), (c)(4), (c)(5) (Supp. IV, 1971).

It has also been claimed that the pretrial detention provisions of the new District of Columbia law abridge the presumption of innocence which is supposed to be included in the guarantee of due process. There has always been pretrial detention in capital cases, and no one has ever seriously maintained that this violated due process of law or any presumption of innocence. This was not possible because the Constitution clearly envisions pretrial arrest and detention by permitting arrests on probable cause.

As explained above, the term due process of law as used in the Constitution does not guarantee any particular procedure.[433] It merely assures to the parties in a given case the regular procedure provided for by the law applicable to their case. Consequently, the presumption of innocence becomes part of due process only in such cases where the applicable law makes it a part of its procedural rules, as, for instance, California has done.[434]

The phrase presumption of innocence is particularly popular in American jurisdictions.[435] It has been used to indicate 1) that the prosecution has the burden of proving guilt, and 2) that the accusation does not create a presumption of guilt, and that therefore the accused should not be treated as if already convicted.[436] Both these principles originated in Roman law, as did the term presumption.[437] As a procedural term, the *praesumptio* is part of the doctrine of the "burden of proof" which developed in Roman civil procedure. The rule was that the party who alleged a right had the burden of proving it. A presumption created an exception to the rule in that it threw the burden of proof on the party who denied the existence of that right.[438] Burden of proof means that a fact must be decided against the party who has the burden of supporting it by proof or evidence but is unable to do so. In criminal procedure the rules of burden of proof did not apply.[439] The rule was simply that the accuser has the burden of proving his accusation and that any doubt with respect to a particular fact must be resolved in favor of the accused. This became the maxim of the European Continental law *in dubio pro reo,* which means, if there is doubt, it must be resolved in favor of the accused.

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[432] United States *ex rel.* Hyde v. McMann, 263 F.2d 940 (2d Cir.), *cert. denied,* United States *ex rel.* Hyde v. LaVallee, 360 U.S. 937 (1959); Wansley v. Wilkerson, 263 F. Supp. 54 (W.D. Va. 1967); *see* D.C. CODE ANN. § 23-1321(h)(2) (Supp. IV, 1971).

[433] *See* notes 1-325 *supra* and accompanying text.

[434] *See* notes 326-327 *supra* and accompanying text.

[435] *See* THAYER 553-54.

[436] *See* notes 326-334 *supra* and accompanying text.

[437] *See* notes 335-336 *supra* and accompanying text.

[438] *See id.*

[439] *See* notes 337-339 *supra* and accompanying text.

It is obvious that, under a system where the rule that the accuser has the burden of proving the accusation is firmly established, no presumption whatever attaches to the accusation, and the party who denies has no burden of proving anything. Consequently, in such a system there is neither need nor room for a presumption of innocence. On the contrary, where the rule that the accuser must prove the accusation is adhered to, the presumption of innocence makes no legal sense.

In the Anglo-Saxon process and the early common law, the accuser did not have to prove the accusation. He only had to show some support thereof. The supported accusation raised a presumption of guilt which could be defeated by the proof–*lex*–of the accused.[440] When the supported accusation was replaced by the indictment of the *inquisitio*–jury–this then raised a presumption of guilt, and the *indictatus* had to go to the proof in order to exculpate himself.[441]

Gradually, proof by the inquest, that is by jury, replaced the formalistic methods of proof, first in civil, later in criminal procedure, and the verdict took the place of the old forms of proof.[442] The jurors based their verdict on their own knowledge. The judges of the common law courts made no attempt to find out how the jurors arrived at their verdict.

In the thirteenth century, the parties in civil proceedings began to insist on informing the jury, by displaying documents, called evidence, and by having the parties' own witnesses made part of the jury, finally, in about the sixteenth century, by having their witnesses testify to the jury in the manner of Romano-canonical witnesses.[443] Eventually, two important principles of the Roman law were adopted for the jury–1) that the verdict had to be based on what had been alleged and proved in court; and 2) that the person who advances a claim or makes a positive assertion has the burden of proving it.[444] The same principles entered into the criminal procedure. Finally, the rule was established for American criminal trials that the prosecution has the burden of proving the accused guilty beyond a reasonable doubt, and that this burden stays with the prosecution from the beginning to the end of the trial.

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[440] *See* notes 342-345 *supra* and accompanying text.

[441] *See* notes 346-347 *supra* and accompanying text.

[442] *See* note 348 *supra* and accompanying text.

[443] *See* notes 354-356 *supra* and accompanying text.

[444] *See* notes 357-360 *supra* and accompanying text.

The emphasis which has been placed on the presumption of innocence in the common law world can only be explained by the complete reversal which its procedural concepts have undergone. Probably it was necessary to impress upon the jury that the indictment does not raise a presumption of guilt and that the accused must be considered innocent until after conviction. Furthermore, the common and statutory laws provide for many inferences and exceptions by which the defendant is required to introduce proof or evidence under threat that he may be convicted if he does not.[445] This shifting of the burden of proof appears to the ordinary mind to be in direct contradiction to the rule that the prosecution has the burden of proving guilt throughout the trial and is bound to cause confusion among the jurors. Here the presumption of innocence serves the purpose of impressing on the jury that any doubt they may have in the defendant's guilt must be resolved in favor of the accused.[446]

As regards the District of Columbia, there is no statutory definition of a presumption of innocence. The courts have usually connected it with the procedural rule that at the trial the burden of proving guilt is on the prosecution.[447] In pretrial proceedings the United States Court of Appeals for the District of Columbia Circuit has used that phrase to indicate that the presumption of innocence entitles the accused to his liberty unless the Government can establish probable cause for his detention in accord with fair process.[448] Here the court merely interpreted what it considered to be fair process under the circumstances of that particular case, in order to establish probable cause required by the Constitution. As may have been expected, the presumption of innocence appears nowhere in the Constitution because the framers were too knowledgeable to include such a nonlegal phrase in a legal document which they intended to be "the supreme law of the land." There is then no constitutional presumption of innocence which could have been violated by an act of Congress creating pretrial detention provisions for the District of Columbia.

As far as the phrase as an expression of public policy is concerned, that persons arrested on a criminal charge should be treated differently from convicted criminals, the new pretrial provisions for the District of Columbia pay more attention to this principle than has any federal legislation in the United States before. For the first time, Congress actually has provided that persons subject to pretrial detention shall be confined, to the extent practicable, in facilities separate from convicted persons.[449] The words "to the extent practicable" merely take into account the lack of separate facilities due to the fact that previous laws never took the trouble to concern themselves with any pretrial presumption of innocence.

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[445] *See* note 367 *supra* and accompanying text.

[446] *See* Robertson v. United States, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966).

[447] *See* Deutsch v. United States, 367 U.S. 456, 471 (1961); Sinclair v. United States, 279 U.S. 263, 296-97 (1929).

[448] Washington v. Clemmer, 119 U.S. App. D.C. 216, 219, 339 F.2d 725, 728 (1964).

Finally, it has been alleged that the new statute denies citizens of the District of Columbia the equal protection of the laws by subjecting them to a system of pretrial detention not applicable to persons charged with crime in the rest of the nation. The equal protection clause of the fourteenth amendment applies to the states but not to Congress.[450] The due process clause of the fifth amendment, which does apply to Congress, contains a guarantee of equal protection insofar as it forbids the exclusion of any individual from the regular procedure. Therefore the question may be asked whether Congress may exclude the citizens of the District of Columbia from a procedure which it has provided for the rest of the nation.

The answer has been given by the Constitution itself—1) it has created the District as an entity separate and distinct from the rest of the nation; 2) it has given Congress plenary power "to exercise exclusive legislation in all cases whatsoever" over the District,[451] while it has given Congress only limited jurisdiction to legislate for the rest of the nation.[452] In the past, Congress has made use of its plenary power for the District by enacting laws which differed from those applying in like situations to the rest of the nation.[453] Similarly, acting under the same plenary power which the Constitution gave Congress over federal enclaves,[454] it has adopted for each federal enclave criminal laws different from the rest of the nation.[455] This was held by the Supreme Court to be constitutional.[456]

The power which Congress exercises over the District is unique insofar as this is the only place where Congress exercises legislative authority in the same manner a state does over its own territory. The new legislation relating to pretrial release and detention was enacted in proper exercise of that power.

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[449] D.C. CODE ANN. § 23-1321(h)(1) (Supp. IV, 1971).

[450] *See* note 386 *supra* and accompanying text.

[451] U.S. CONST. art. I, § 8, cl. 17.

[452] *See* notes 387-388 *supra* and accompanying text.

[453] *See* notes 394-398 *supra* and accompanying text.

[454] U.S. CONST. art. I, § 8, cl. 17.

[455] *See* notes 391-393 *supra* and accompanying text.

[456] *See* notes 392-398 *supra* and accompanying text.

## CONCLUSION

It follows from the foregoing discussion that the pretrial provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970 do not in any way violate the United States Constitution if construed in accordance with the natural meaning of its language in its historical setting. Even if Supreme Court decisions, which have deviated from the clear language of the Constitution, are taken into consideration at their present posture, no other conclusion can be drawn.

The pretrial detention provisions of the statute under discussion concern legislation clearly left to Congress by the Constitution to determine what to do with persons after an arrest on probable cause as authorized by the Constitution.[457] Thus, Congress has acted in the exercise of its legislative authority which it plainly has under the United States Constitution.

However, if a majority of the Supreme Court continues the unauthorized practice of amending the Constitution by adding to it new rules not contemplated by the Constitution,[458] then no one can predict whether or not the new pretrial detention provisions will be permitted to survive.

## APPENDIX[459]

In the United States, the customary way of beginning criminal prosecution is by indictment or information and arrest. Although the laws permit the use of a summons instead of an arrest,[460] this is very rarely used. Consequently the question of release from custody pending trial occurs in almost every criminal case.

This is quite different in the democracies of the European continent. There the rule is that a person suspected of having committed a crime should be brought before the court by a summons and that arrest and detention should only be resorted to in emergencies. Consequently the question of release or detention does not arise almost automatically in every criminal case as it does in the United States. The prerequisites for arrest are strictly regulated by statutes.

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[457] *See* note 422 *supra* and accompanying text.

[458] *See* notes 215-324 *supra* and accompanying text.

[459] This Appendix considers the treatment of suspects before trial in some democracies of the European Continent. The countries here considered are France, Germany, and Switzerland, because these nations have largely influenced the laws of the other European countries. In this Appendix, the term German law refers to the law of the German Empire and that of its successor, the Federal Republic of Germany.

[460] One example of such a provision is the following: "If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. . . . If a defendant fails to appear in response to the summons, a warrant shall issue." FED. R. CRIM. P. 4.

*Arrest without a Warrant.* Arrests without a warrant are permitted only in emergency situations. Thus, the *French Code of Penal Procedure* permits arrests without a warrant only in cases of a *crime flagrant or délit flagrant.* This means that a person must be caught in the act of committing a crime—not merely a minor violation—or immediately thereafter, or during hot pursuit, or if he is found with articles in his possession, or shows traces or signs which indicate that he has participated in a crime.[401]

The *German Code of Criminal Procedure* also requires as a prerequisite for arrest without a warrant that a person be caught in the act of committing a crime or in hot pursuit, but it makes the additional requirement that there must be reason for suspicion that the suspect will flee or that his identity cannot be established immediately.[402]

The *Swiss Federal Code of Criminal Procedure* authorizes a preliminary arrest to be made 1) by officials and employees of the judicial police if there is suspicion that a crime—not merely a minor violation—has been committed and there is danger that if the arrest is delayed until a warrant is issued the offender might flee or tamper with the evidence; 2) by any person who witnesses the commission of a crime—not a minor violation—or arrives immediately thereafter, who must, however, immediately hand over the offender to the police.[403]

Similarly, Swiss *cantonal* codes permit arrest without a warrant by a police officer if a crime—not a minor violation—has been committed in his presence or if there is strong suspicion that a person has committed a crime and there is danger of flight or tampering with the evidence. A resident of the *canton* cannot be arrested without a warrant for a minor violation unless the arrest is necessary to prevent the offender from continuing to disturb the public peace and order. A non-resident may be arrested in such a case if he does not pay the fine or furnish security therefor.[404]

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[401] FRENCH C. PRO. PÉN. art. 53, 73.

[402] GERMAN STPO § 127.

[403] BUNDESGESETZ UEBER DIE BUNDESSTRAFRECHTSPFLEGE art. 62, 63 [hereinafter cited as SWISS FED. C. CR. PR.]; *see* F. STAMPFLI, BUNDESGESETZ UEBER DIE BUNDESSTRAFRECHTSPFLEGE vom 15 Juni 1934 (Federal Law concerning the Federal Administration of Criminal Justice, ann. art. 62, 63 (1935).

[404] STRAFPROZESSORDNUNG FUER DEN KANTON AARGAU § 72 [hereinafter cited as AARGAU C. CR. PR.]; STRAFPROZESSORDNUNG FUER DEN KANTON BASEL-STADT § 61; GESETZ UEBER DAS STRAFVERFAHREN DES KANTONS BERN art. 72-74 [hereinafter cited as BERN C. CR.

A preliminary arrest serves only the purpose of securing the person of a suspect in emergency cases where there would be danger in delay. Therefore the codes have provisions to the effect that the arrested person should be taken immediately before a judge or other official authorized to issue a warrant.[465] That official must determine whether the issuance of a warrant is indicated or whether the suspect should be released.

*Requirements for the Issuance of a Warrant of Arrest.* As mentioned above, an arrest warrant before conviction is the exception rather than the rule. It may only be issued if the conditions required by law for the detention of a suspect are met. Common to all countries under consideration is the requirement that there must be a strong suspicion that a person has committed a crime for which, if found guilty, he may be sentenced to imprisonment of some length, and a number of specified conditions must exist. These conditions vary in different jurisdictions.

The two conditions common to all countries under which an arrest warrant may issue when there is a strong suspicion that a person has committed a serious crime are danger of flight and danger of collusion, that is if special facts give cause for a well founded suspicion that the suspect will destroy the traces of his crime, or try to induce witnesses to testify falsely, or otherwise tamper with evidence. These are still the only conditions for pretrial arrest in the Swiss federal criminal procedure and in some *cantonal* codes.[466]

Originally danger of flight and collusion were the only conditions for pretrial arrest in Germany also. But in 1952 Germany adopted the *European Convention for the Protection of Human Rights and Fundamental Freedoms* which contains certain minimum protections of individual rights and liberties.[467] It should be noted that article five of the

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Pr.]; Code de procédure pénale du Canton de Geneve art. 94 [hereinafter cited as Genéve C. Pro. Pèn.]; Gesetz betreffend den Strafprozess (Strafprozessordnung) fuer den Kanton Zuerich §§ 68, 69, 339 [hereinafter cited as Zurich C. Cr. Pr.]. Genève C. Pro. Pen. article 94 provides that police cannot enter a residence unaccompanied by an official authorized to issue a warrant to bring in—mandat d'amener—except in case of *flagrant delit*, or fire, or flood, or when called by a person in a house.

[465] French C. Pro. Pen. art. 68-72, German StPO § 128 (before magistrate of district in which arrest took place); Swiss Fed. C. Cr. Pr. art. 62II; Aargau C. Cr. P. § 73 Bern C. Cr. Pr. art. 77; Zurich C. Cr. Pr. § 73.

[466] *See* Swiss Fed. C. Cr. Pr. art. 44; Bern C. Cr. Pr. art. 111; Zurich C. Cr. Pr. § 49, 54.

[467] Article five of the *Convention* provides:

> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

*Convention* contains a due process clause in modern form—"No one shall be deprived of his liberty save . . . in accordance with a procedure prescribed by law." It means exactly the same as the original and true meaning of due process in the fifth and fourteenth amendments in the United States Constitution, and as it was interpreted correctly for more than 100 years by American courts before they misused the concept for extraneous purposes, namely the guarantee of the protection of the regular procedure.[468]

As far as grounds for arrest are concerned, article five of the *Convention* merely intended to guarantee certain minimum requirements among the member nations. It did not intend to compel a member nation which had more liberal provisions concerning the pretrial freedom of persons charged with crime to adjust its laws to less liberal provisions of the *Convention*. But that is what happened in the Federal Republic of Germany. There the provisions concerning pretrial detention were amended by the Law of December 19, 1964, which went into effect on April 1, 1965.[469] The new law added to the two established grounds of pretrial detention, namely danger of flight and collusion,

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> (a) the lawful detention of a person after conviction by a competent court;
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> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so;
>
> . . . .
>
> (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS art. 5 (1952).

[468] *See* notes 27-166 *supra* and accompanying text.

[469] Law of Dec. 19, 1964, [1964] BGB1. I 1067.

a third ground, but only for persons suspected of having committed certain specified serious sex crimes. They may be ordered detained not only because of danger of flight and collusion, but also when specific facts give ground to fear that the suspect may commit another crime of the same kind before final judgment, and detention is necessary for the prevention of a threatening danger. In cases of intentional homicide a suspect may be ordered detained even if there is neither danger of suppression of evidence nor danger of repetition.[470] However, the Federal Constitutional Court has held that even in a murder case detention should not be ordered automatically but only if necessary to achieve the purposes of the investigation, and if this can be done by substituting the measures listed in section 116 of the *Code of Criminal Procedure* detention should be avoided.[471] Section 116 provides that if it will not interfere with the purposes of the investigation, the judge may stay the execution of a warrant of arrest and may instead impose conditions, such as to report regularly to a designated person or authority, not to leave a certain territory or place of residence without permission, or to leave it only under supervision of a designated person, to furnish security, or not to communicate with accomplices, witnesses or experts. A violation of any condition imposed by the judge may be sanctioned with the execution of the arrest warrant. The suspect will be arrested if he makes preparation to flee, or fails to answer a summons without sufficient excuse, or new circumstances necessitate his detention.[472]

In France pretrial detention has been newly regulated by the Law of July 17, 1970, which amended the pertinent provisions of the *Code of Penal Procedure*. Already before the amendment, article 137 had provided that detention before judgment was to be an exceptional measure. However, the former law contained expressions like *détention préventive* (preventive detention), for pretrial detention, and *liberté provisoire* (provisional liberty), if the suspect was permitted to remain free, which, it was felt, did not correctly reflect the spirit expressed by article 137. The new law has abolished the term provisional liberty and changed preventive detention into provisional detention. A person charged with the commission of a crime simply remains at liberty unless it becomes absolutely necessary to restrict his liberty in order to ensure an uninhibited conduct of the investigation. Formerly, the law knew only detention for that purpose. The law itself did not specify the grounds on which detention could be ordered, but article C. 274 of the General Instructions contained in part five of the *Code of Penal Procedure* specified that preventive detention should only be ordered if there are very grave presumptions of culpability, and in addition if there is good reason to fear that the suspect will flee, influence witnesses, destroy evidence, commit new crimes, or if he disturbs the public order.[473]

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[470] GERMAN STPO § 112.

[471] Judgment of Dec. 15, 1965, 19 BVERFG 342, 350.

[472] *See* GERMAN STPO § 116.

The new law now specifies directly under what conditions the liberty of a suspect may be restricted. In order to avoid detention whenever possible, it has introduced the concept of judicial control.[474] The law provides that judicial control as well as provisional detention shall only be imposed by the examining judge when absolutely necessary for the investigation or as a security measure and in accordance with the conditions specified by law.[475]

Judicial control may be ordered by the examining judge if the suspect is likely to incur confinement in a reformatory or a more severe penalty. It may consist of one or more of the following restrictions—1) not to leave certain territorial limits determined by the examining judge; 2) not to leave home or a residence designated by the examining judge except upon special permission; 3) not to go to certain places or go only to such places as expressly authorized by the judge; 4) inform the judge whenever he goes outside of the prescribed limits; 5) to report periodically to a service or authority designated by the examining judge which must observe strict secrecy about the acts with which the suspect has been charged; 6) to answer any summons of any authority or person designated by the judge and to submit to supervision of his professional activities or of his assiduity to an education; 7) to surrender all papers showing his identity, especially a passport, against a receipt which will serve as proof of identity; 8) to refrain from driving any or certain vehicles, and to surrender against receipt his driver's license; 9) to refrain from associating or communicating with certain designated persons; 10) to submit to being examined or treated, even in a hospital, especially for purpose of detoxification; 11) to furnish security as determined by the examining judge upon consideration of the suspect's financial means; 12) not to practice certain professional activities if the offense has been committed in the exercise or in connection with such activities and if there is fear that a new offense might be committed.[476] If the suspect voluntarily evades the imposed restrictions, he is subject to arrest or detention, depending on the duration of imprisonment to be expected.[477]

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[473] FRENCH C. PRO. PÉN. art. C. 274.

[474] *Id.* art. 138-43.

[475] *Id.* art. 137.

[476] *Id.* art. 138.

Provisional detention may be ordered in cases of less serious crimes in accordance with article 144 of the *Code of Penal Procedure* if the penalty may be at least two years imprisonment and if judicial control will not suffice, 1) if provisional detention is the only way to preserve the evidence, or prevent pressure on witnesses or fraudulent understandings between suspects and accomplices; or 2) if such detention is necessary to preserve public order or to protect the suspect, to put an end to the offense or prevent its repetition, or to assure that the suspect will be available to the court.

Provisional detention may also be imposed if the suspect has voluntarily evaded his obligations imposed by the judicial control.[478] Provisional detention may not exceed four months. It may be extended for another four months by an order stating in detail the reasons therefor. No further extension is permitted.[479]

In cases of serious crimes the examining judge may order provisional detention by simple order without specifying the reasons.[480] The judge may, ex officio and upon notification of the prosecutor, order the suspect released or placed under judicial control upon his promise to appear at all proceedings and report any change of address.[481] The suspect or his counsel may make a request for release on the same conditions. Release, if granted, may be combined with judicial control.

Willful disregard of a summons to appear or of any of the conditions of release will not create a new crime, as it does in the United States.[482] It merely may lead to an order to bring the suspect before the judge, or even to arrest and pretrial detention.[483] Any person ordered detained may at any time request judicial review of the grounds for his detention.[484] Persons under detention must be kept separate from convicted prisoners and may be subjected only to such restrictions as are absolutely necessary for the purpose of the investigation or the order of the house of detention.[485] The suspect must be released as soon as there is no longer any need for his detention or also if a continuing detention would be in no proportion to the gravity of the charge and to the penalty to be expected.[486]

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[477] *Id.* art. 141-42.

[478] *Id.* art. 144.

[479] *Id.* art. 145.

[480] *Id.* art. 146.

[481] *Id.* art. 147.

[482] *See* 18 U.S.C. § 3150 (1970); D.C. CODE ANN. §§ 23-1327 to 29 (Supp. IV, 1971).

[483] *See, e.g.*, FRENCH C. PRO. PÉN. art. 131-33, 141-42; GERMAN StPO § 116; SWISS FED. C. CR. PR. art. 39.

[484] FRENCH C. PRO. PÉN. art. 148 to 148-1; GERMAN StPO § 117; SWISS FED. C. CR. PR. art. 52.

[485] GERMAN StPO § 119; SWISS FED. C. CR. PR. art. 48.

Bail plays practically no role in continental criminal procedure. Almost all codes have provisions for release on bail in case of danger of flight, but in practice it is rarely applied. One reason for this reluctance to use bail as a condition of release is its unfairness toward the poor. For that reason, Sweden has completely abolished that institution.[487] Another reason is that in continental law, pretrial detention is always an exceptional measure and can be imposed only when the above described very high standards for the issuance of a warrant have been met. If the guilt of the suspect is highly probable and if the offense is major, only very high bail would ensure his presence at the trial, and this would be highly discriminatory against a person with small means.

However, the codes do have provisions regarding the use of the bail money, in case bail has been imposed. For example, the *Swiss Federal Code of Criminal Procedure* provides that security for the appearance of a suspect who was released on bail may be furnished by depositing money or articles of value or by a surety. Amount and nature are determined by the judge in accordance with the gravity of the charges and the financial situation of the suspect. The security is released if the suspect is arrested either because he makes preparations to flee, or fails to appear upon a summons without sufficient excuse, or because new circumstances require his detention. The security is also released if the ground for detention, namely danger of flight, no longer exists, if the investigation is discontinued, if the defendant is acquitted, or when he begins to serve his sentence. The security is forfeited if the defendant avoids prosecution or execution of a prison sentence by fleeing or hiding. Forfeited security is used for the payment of the costs, for compensation of damages caused by the crime, and for payment of any fines. Any remaining amount becomes property of the Federal Tribunal, but will be refunded if the convicted defendant surrenders himself before the expiration of the statute of limitations.[488]

The time spent in pretrial detention is not lost, because the codes contain provisions to the effect that in case of conviction, the judge may credit it to the sentence.[489] In case the investigation against a suspect is discontinued, or if he is tried and acquitted, he is entitled, upon request, to be paid a compensation for any detriment suffered by him because of his detention or other actions of the investigation. Compensation may be refused if the arrested person has deliberately or through gross negligence caused the detention. The decision of the judge concerning a request for compensation is appealable. If the investigation was instigated by fraud or gross negligence on the part of the informer or injured party, they may be held liable to reimburse the Government in whole or in part for the compensation paid to the suspect.[490]

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[486] GERMAN STPO § 120; SWISS FED. C. CR. PR. art. 50. *But see* FRENCH C. PRO. PÉN. art. 144.

[487] *See* G. MUELLER & F. LEPOOLE-GRIFFITHS, COMPARATIVE CRIMINAL PROCEDURE 23-24 (1969).

[488] SWISS FED. C. CR. PR. art. 53-55, 57, 58, 60; *see* FRENCH C. PRO. PÉN. art. 142 to 142-3. *But see* GERMAN STPO § 124.

[489] GERMAN STGB § 60; SWISS FED. C. CR. PR. art. 171; STGB art. 69; FRENCH C. PÉN. art. 24.

*Summary.* In the democracies of the European continent the fundamental rule is that a person accused of having committed a crime is entitled to remain free until the State has proven him guilty. Consequently, the regular procedure to bring a suspect before the judge is by a summons. He may be arrested and detained only if it can be shown that he is likely to flee or tamper with the evidence, or, in some jurisdictions, also that he may commit a dangerous crime. Release on bail in case of arrest is permissible only in case of danger of flight, but in practice it is rarely used because of its discrimination toward people unable to pay. For that reason, Sweden has abolished bail altogether. The concern of European continental law is the same as that of the United States Constitution,[491] namely under what circumstances the government may deprive an individual of his freedom. As Europe has shown, this can be accomplished without the bail system.

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[490] SWISS FED. C. CR. PR. art. 122; GERMAN STPO § 467-74. France assumed responsibility for compensating persons innocently subjected to pretrial detention only by the Law of July 17, 1970. FRENCH C. PR. PÉN. art. 149. France also provides for the state's right of redress against the informer who acted in bad faith, or a person whose false testimony has either provoked or extended the detention.

[491] *See* note 414 *supra* and accompanying text.

# A NEW APPROACH TO BAIL RELEASE: THE PROPOSED FEDERAL CRIMINAL CODE AND BAIL REFORM

*Edward M. Kennedy**

> *[T]he present [bail] system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.***

## INTRODUCTION

HISTORICALLY,[1] bail has been viewed as a procedure designed to ensure the defendant's appearance at trial by requiring him to post a bond or, in effect, make a promise to appear.[2] Current findings suggest, however, that this traditional approach, though noble in design, has one important shortcoming. It fails to deal effectively with those defendants who commit crimes while they are free on bail.[3] With increasing frequency, persons on bail are being arrested and charged with serious felonies.[4] One recent study found that approximately thirteen percent of felony defendants in the District of Columbia were arrested for crimes committed while they were free on bail.[5] In another study, sixty-five percent of those arrested for auto theft were arrested for another auto theft while out on bail.[6] Other crime categories also showed high arrest rates during the pretrial release period: larceny and forgery, forty percent; robbery, thirty-three percent; and burglary, twenty-seven percent.[7] The failure of our bail laws to balance the likelihood of the defendant's appearance at trial with the needs of community safety indicates the need for reform.[8] This Article presents a brief history of the federal bail laws, and outlines the debate concerning bail reform. It then offers an innovative, alternative approach to the bail release of the suspected offender—the bail provisions of the federal Criminal Code Reform Act of 1979 (S. 1722).[9]

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* Chairman, Committee on the Judiciary, United States Senate. A.B. 1954, Harvard College; LL.B. 1959, University of Virginia.

** A. Beeley, The Bail System in Chicago 160 (1927).

[1] For a discussion of the development of the bail laws see 1 J. Stephen, A History of the Criminal Law of England 233-43 (1883); Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. Pa. L. Rev. 959, 965-89 (1965); Meyer, *Constitutionality of Pretrial Detention* (pt. 1), 60 Geo. L.J. 1139, 1145-78 (1972).

[2] *See* D. Freed & P. Wald, Bail in the United States: 1964, at 1-8 (1964).

[3] Address by Chief Justice Burger, ABA Midyear Meeting 9 (Feb. 3, 1980).

[4] P. Wice, Freedom for Sale 73-77 (1974); J. Roth & P. Wice, Pretrial Release and Misconduct in the District of Columbia II-45 to -51 (Institute for Law & Social Research, PROMIS Research Project No. 16 1978) [hereinafter cited as Inslaw Study]. This landmark study focuses on the effectiveness of the pretrial release system in the District of Columbia. It is based on data pertaining to 11,000 felony and misdemeanor cases arraigned in the District of Columbia Superior Court during 1974. *Id.* at *Foreword; see Pretrial Release or Detention: Hearings and Markups Before the House Subcomm. on Judiciary & the House Comm. on the District of Columbia*, 94th Cong., 2d Sess. 50 (1976) (statements of Charles R. Work & William A. Hamilton); *id.* at 208 (statement of Frank Q. Nebeker); Report of the Judicial Council Comm. to Study the Operation of the Bail Reform Act in the District of Columbia (May, 1969), *reprinted in id.* at 303, 312-17, 355, 359-62.

[5] Inslaw Study, *supra* note 4, at II-48. The rearrest rate for defendants charged with misdemeanors was seven percent. *Id.*

[6] D.C. Bail Agency, How Does Pretrial Supervision Affect Pretrial Performance? 15 (1978).

## I. THE FEDERAL BAIL LAWS

While the United States Constitution does not expressly provide a right to bail,[10] federal statutes have historically mandated that "bail shall be admitted"[11] in noncapital cases.[12] The Supreme Court has construed this language as providing a "traditional right to freedom before conviction."[13] This right, however, is not absolute; it "is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty."[14] Until recently, this "adequate assurance" generally took the form of a bail bond purchased from a professional bail bondsman.[15] Thus, a suspect who could afford to pay the bail premium was released, while his indigent counterpart, unable to raise the necessary money, remained in jail pending trial.[16] In the 1960's, scholars began to question the fairness of these bail procedures.[17] Their studies revealed that, in addition to losing his freedom, the defendant who remains in jail often loses his job and is unable to provide for his family.[18] More importantly, complete pretrial incarceration hinders the defendant in preparing his defense:

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[7] *Id.* While this study is informative, it is not comprehensive. It focused on 300 defendants who were divided into three groups, each of which received a different level of bail release supervision by an outside agency. The study found that supervision affected appearance rates. It did not, however, reveal any relationship between differing levels of supervision and pretrial crime. *Id.* at 1-3.

[8] This Article focuses on reform of the federal bail laws. This is not to underestimate similar problems arising in various states, but rather reflects my own experience as a United States Senator. The states, however, have also been very active in bail reform. For an overview of these efforts see W. Thomas, Bail Reform in America (1976). One notable reform has been in attempting to eliminate the need for bail bondsmen by permitting the suspect himself to post a percentage of the amount of the bond. If the defendant appears for trial, the deposit is returned to him at the conclusion of the case. *See* W. Thomas, *supra*, at 183-99; Center on Administration of Criminal Justice, University of California, Davis, Cost Analysis—10 Percent Deposit Plan (June 1979) (on file with the *Fordham Law Review*); Kannensohn & Howard, Bail Bond Reform in Kentucky and Oregon (1978). Perhaps the commercial system would be justifiable if it was more effective than the deposit plans. Statistics indicate, however, that the appearance rates under both approaches are similar. W. Thomas, *supra*, at 192-95.

[9] S. 1722, 96th Cong., 1st Sess. (1979) (available from the U.S. Government Printing Office). S. 1722 codifies and modernizes the entire federal criminal law. Its bail provisions are not limited to the issues surrounding the pretrial bail release decision. For example, S. 1722 establishes new requirements governing the issuance of bail to those defendants convicted and awaiting sentence, *id* § 3504(a), or appellate review of their convictions, *id.* § 3504(b). *See* S. Rep. No. 553, 96th Cong., 2d Sess. (1979). S. 1722 is the culmination of more than 25 years of effort in the area of criminal code reform. *See generally Reform of the Federal Criminal Laws, Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st-94th Cong. (1971-1975); Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097 (1952). For a more detailed discussion of criminal code reform in general, and my role in particular, see Kennedy, *Federal Criminal Code: An Overview*, 47 Geo. Wash. L. Rev. 451 (1979); Kennedy, *Reforming the Federal Criminal Code: A Congressional Response*, 8 N.C. Cent. L.J. 1 (1976); Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353 (1979).

[10] Scholars have debated whether a constitutional right to bail can be implied from the command of the eighth amendment that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII. *Compare* Foote, *supra* note 1, at 965-89 (yes) *with* Meyer, *supra* note 1, at 1179-94 (no). The Supreme Court has spoken on this issue only once. In Carlson v. Landon, 342 U.S. 524 (1952), petitioners were arrested and charged with being members of the Communist Party. Pursuant to provisions of the Internal Security Act, petitioners were being held without bail pending resolution of deportation proceedings. *Id.* at 528-29. The Court, noting that the eighth amend-

> He cannot help locate witnesses or evidence which may be more accessible to him than to any outsider. His contacts with counsel may be impeded by having to plan a defense in cramped jail facilities within the limited hours set aside for visitors. The pretrial prison experience may adversely affect his demeanor and attitude in the courtroom or on the witness stand. If convicted, the defendant who has lost his job and been removed from his family will stand a far poorer chance for probation than the one who has earned money, kept his job, and maintained strong family ties.[19]

In an attempt to find an alternative bail procedure that would lessen the almost universal dependence on commercial bail bonds, a number

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ment had not prohibited Congress from specifying those crimes for which bail would not be allowed, concluded that "the Eighth Amendment does not require that bail be allowed under the circumstances of these cases." *Id.* at 546; *accord,* United States v. Kirk, 534 F.2d 1262, 1281 (8th Cir. 1976), *cert. denied,* 433 U.S. 907 (1977).

[11] Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91 (current version at 18 U.S.C. § 3146 (1976)).

[12] A noncapital offense is one not punishable by death. 18 U.S.C. § 3146 (1976). Bail release for capital offenses is within the discretion of the court. *Id.* § 3148.

[13] Stack v. Boyle, 342 U.S. 1, 4 (1951).

[14] *Id.*

[15] This practice derived from the English bail system in which a third party assumed responsibility for the future appearance of the accused. Because of colonial America's vast frontier, however, this custom of personal responsibility was not practical. The surety's promise to produce the defendant, therefore, gradually eroded into a promise to pay a sum of money if the accused did not appear at trial. This development created a need for commercial bondsmen. Note, *Bail: An Ancient Practice Reexamined,* 70 Yale L.J. 966, 966-68 (1961); *see* D. Freed & P. Wald, *supra* note 2, at 2-3. For an explanation of the role of the bail bondsman see *id.* at 22-38.

[16] *Id.* at 21; *see* S. Rep. No. 750, 89th Cong., 1st Sess. 6 (1965); Subcomms. on Constitutional Rights & Improvements in Judicial Machinery, Senate Comm. on the Judiciary, 88th Cong., 2d Sess., Summary Report on Constitutional Rights and Federal Bail Procedures 1 (Comm. Print 1964) [hereinafter cited as Summary Report].

[17] D. Freed & P. Wald, *supra* note 2, at 9-21. This inquiry continues today. *See* Zeisel, *Bail Revisited,* 1979 Am. B. Foundation Research J. 769.

[18] D. Freed & P. Wald, *supra* note 2, at 42-43.

[19] *Id.* at 46 (footnotes omitted); *see* S. Rep. No. 750, 89th Cong., 2d Sess. 7 (1965).

of pilot projects were undertaken.[20] Under these programs, a defendant was released on his own recognizance if an evaluation of his employment, family, and community relationships indicated that he was likely to appear at future court proceedings.[21] In the Manhattan Bail Project, one of the most successful of these pilot programs, ninety-nine percent of those released on their own recognizance returned to court as required.[22]

The Congressional response to these findings was the Bail Reform Act of 1966.[23] While this Act reaffirms the basic proposition that in noncapital cases a person is to be released on bail under minimal conditions reasonably required to ensure his presence at trial,[24] it is premised on the belief that a poor defendant is no more likely than his wealthy counterpart to flee the jurisdiction.[25] The Act, therefore, attempts to narrow the discrepancy in pretrial release opportunities for the rich and poor by mandating a presumption in favor of release, either on personal recognizance or on execution of an unsecured appearance bond, for all those charged with a noncapital criminal offense.[26] If the judicial officer determines that neither of these approaches is adequate, the Act lists a number of other conditions which may be imposed upon the defendant to ensure his appearance in court.[27] Although the imposition of a money bond is still permitted, it is to be imposed only after the court has determined that all other nonfinancial conditions, such as placing the defendant in the custody of another person, or placing restrictions on the defendant's travel, are inadequate to ensure his future appearance.[28]

## II. THE BAIL REFORM DEBATE

During the past decade, the debate concerning appropriate bail procedures has intensified.[29] On one side of the debate are those who advocate retention of the present bail system, which is grounded in the traditional notion of likelihood of flight.[30] This approach is followed by most federal and state statutes which specify that judges, in deciding whether to permit a suspect's release on bail, may consider only those factors necessary to secure his appearance at future court proceedings.[31] On the other side of the debate are those who champion a substantial modification of the present bail scheme to permit the court to consider community safety in determining whether bail should be granted in a given case.[32] Under this approach, judges are permitted to consider the potential threat the defendant poses to the community to which he returns.[33]

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[20] For a summary of these projects see D. Freed & P. Wald, *supra* note 2, at 9-21; P. Wice, *supra* note 4, at 98-108.

[21] D. Freed & P. Wald, *supra* note 2, at 59-70.

[22] Summary Report, *supra* note 16, at 5. For a more thorough discussion of the research methods used in the Manhattan Bail Project see Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 67 (1963).

[23] Pub. L. No. 89-465, 80 Stat. 214-16 (codified at 18 U.S.C. §§ 3146-3151 (1976)).

[24] Summary Report, *supra* note 16, at 4; Ryan & Carver, A Perspective on the Public Policy Implications of Pretrial Detention 5 (1978) (on file with the *Fordham Law Review*); *see* note 2 *supra* and accompanying text.

[25] Summary Report, *supra* note 16, at 5-7.

[26] 18 U.S.C. § 3146(a) (1976).

[27] *Id.* at (1)-(5).

[28] *Id.*; S. Rep. No. 750, 89th Cong., 2d Sess. 11 (1965).

[29] *See, e.g.*, Cohen, *Wealth, Bail, and the Equal Protection of the Laws*, 23 Vill. L. Rev. 977 (1978); Gottfredson, *An Empirical Analysis of the Pretrial Release Decision*, 2 J. Crim. Just. 287 (1974); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev.

Expanding the bail decision to incorporate considerations of community safety presents two basic concerns. First, some scholars argue

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1223 (1969); Nat'l Assoc. of Pretrial Services Agencies, Performance Standards and Goals for Pretrial Release and Diversion: Release (1978); Nat'l Center for State Courts, An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs (1975); Ryan & Carver, *supra* note 24; Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1970).

[30] *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 5 (1951); Foote, *supra* note 1, at 998-99; Tribe, *supra* note 29, at 376-77.

[31] *See, e.g.*, 18 U.S.C. § 3146 (1976); Ariz. Rev. Stat. Ann. § 13-3967(c) (West 1978); Cal. Penal Code § 1275 (West 1970); Idaho Code § 19-2902 (1979); Ill. Ann. Stat. ch. 38, § 110-2 (Smith-Hurd 1970); Iowa Code Ann. § 811.2 (West 1979); Kan. Stat. Ann. § 22-2802(1) (Supp. 1978); Ky. R. Crim. P. 4.00; La. Rev. Stat. Ann. § 15.81 (West 1967); Me. Rev. Stat. Ann. tit. 15, § 216 (1980); Mass. Ann. Laws ch. 276, § 65 (Michie/Law. Co-op Supp. 1978); Miss. Code Ann. § 99-5-11 (1973); Mo. Ann. Stat. § 544.040 (Vernon Supp. 1980); Mont. Rev. Codes Ann. § 95-1101 (1969); Neb. Rev. Stat. § 29-901 (1975); N.M. R. Crim. P. 18; N.Y. Crim. Proc. Law § 510.30 (McKinney 1971 & Supp. 1979); N.D. R. Crim. P. 46(a)(1); Ohio R. Crim. P. 46(A); S.D. Codified Laws Ann. § 23A-43-2 (1979); Tenn. Code Ann. § 40-1215 (Supp. 1979); Tex. Code Crim. Proc. Ann. art. 17.15 (Vernon 1977); Wis. Stat. Ann. § 969.01 (West 1971 & Supp. 1979).

[32] Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 Brooklyn L. Rev. 277, 296-304 (1971); Mitchell, *supra* note 29, at 1223. One interesting approach to bail release has been advanced by the Office of the Deputy Mayor for Criminal Justice of the City of New York. That office has authored a study bill which would permit the court, for certain designated felonies, to deny bail regardless of the likelihood that the defendant will flee the jurisdiction. Under this plan, community safety considerations are brought into the bail decision through the back door. Although the bail release decision purportedly continues to be a decision based solely on considerations of flight, the court has the power to deny bail on the ground that "the People's interest in the [defendant's case] is such that no risk of the defendant's non-appearance should be taken." Proposal to Amend N.Y. Crim. Proc. Law § 510.30 (on file with the *Fordham Law Review*); N.Y. Times, May 15, 1979, § A, at 18, col. 1. An obvious problem with this approach is that there is some question as to whether a defendant charged with a more serious crime is, in fact, less likely to appear at trial. *See* Inslaw Study, *supra* note 4, at IV-18 to -21.

[33] There are a few states which follow this approach. *See, e.g.*, Alaska Stat. § 12.30.020(a) (1979); Del. Code Ann. tit. 11, § 2105(a) (1979); Hawaii Rev. Stat. § 804-1, -7.1 (1976 & Supp. 1978); Minn. R. Crim. P. 6.02; N.H. Rev. Stat. Ann. § 597:5, :6-a (1974); N.C. Gen. Stat. § 15A-534 (1978 & Supp. 1979); S.C. Code § 17-15-10 (1976); Vt. Stat. Ann. tit. 13, § 7554(a) (1974); Va. Code § 19.2-120 (Supp. 1979).

that to consider factors other than flight is contrary to the presumption of innocence and undermines the accused's constitutional protections.[34] Second, it is difficult to predict with any degree of certainty which suspects are likely to pose a danger to the community.[35] Nevertheless, the critical problem of crimes committed by persons on bail cannot be ignored.[36] Statistics indicate that the likelihood of a person committing additional crimes while on bail is not only higher than the crime rate for the general population,[37] but that it is also much higher than the likelihood of the suspect's failing to appear at trial.[38] Further, although federal and state bail laws largely ignore these facts, judges do not. It appears to be an established practice for judges to set high bail or to jail a suspect because the court is convinced the accused is dangerous and will commit another crime if released.[39] Community safety is, therefore, an underlying consideration in bail decisions even though most statutes speak only in terms of flight.[40] This approach is neither candid nor fair. Moreover, such *ad hoc* bail decisionmaking promotes arbitrariness because no candid reason is articulated for granting or denying bail in a particular case.

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[34] *Compare* Ervin, *Foreword, Preventive Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L. L. Rev. 289, 297-98 (1971); Tribe, *supra* note 29, at 380-90, 396-406 *with* Meyer, *supra* note 1, (pt. II) at 1382. *See generally* notes 29-30 *supra*.

[35] ABA, Advisory Comm. on Pretrial Release, Standards Relating to Pretrial Release § 5.5, Commentary at 68 (Approved Draft 1968); Foote, *supra* note 2, (pt. II) at 1169-74. The difficulty of predicting the future dangerousness of a defendant has been documented. Monahan, *The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus*, in Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 244 (A. Blumstein, J. Cohen & D. Nagin eds. 1978); *see* N. Morris, The Future of Imprisonment 31-43, 62-73 (1974). *But see* Meyer, *supra* note 1, (pt. I) at 1142.

[36] *See* notes 4-7 *supra* and accompanying text.

[37] In 1974, the year analyzed in the Inslaw Study, *supra* note 4, at *Foreword*, the crime rate in the United States was 4.85%. U.S. Dep't of Justice, Uniform Crime Reports for the United States 37 (1977). This rate is based on a measure known as a crime index, which consists of seven crimes: murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft. *Id.* at 36.

[38] The Inslaw Study revealed an overall nonappearance rate of approximately 11%. Inslaw Study, *supra* note 4, at II-51. This percentage dropped, however, when the nonappearance was categorized as willful or nonwillful. Only 3.5% of felony defendants and 2.5% of misdemeanor defendants willfully avoided court appearance. *Id.* at II-59. *See also* P. Wice, *supra* note 4, at 65-73.

[39] One of our most distinguished federal judges, Marvin E. Frankel, acknowledged this practice in his opinion in United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969): "While 'danger to any other person or to the community' is not in itself a proper consideration for pretrial bail in a noncapital case, we doubt that a defendant's powerful disposition to incur further criminal liabilities could be ignored utterly in judging what will 'reasonably assure' his appearance for trial. . . . [I]t is apparent that in this instance, as in many others familiar to all of us, the statement of the astronomical [amount set for bail] is not meant to be literally significant. It is a mildly cynical but wholly undeceptive fiction, meaning to everyone 'no bail.' There is, on the evidence adduced, no possibility that any of these defendants will achieve release by posting bond in anything like the amount which has been set." *Id.* at 126-27 (footnotes omitted); *see* Hairston v. United States, 343 F.2d 313, 313 (D.C. Cir.) (Bazelon, C.J., dissenting), *cert. denied*, 382 U.S. 856 (1965); H.R. Rep. No. 907, 91st Cong., 2d Sess. 84-85 (1970); P. Wice, *supra* note 4, at 2-3; Cohen, *supra* note 29, at 997; Tribe, *supra* note 29, at 372 n.5.

[40] Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. Legal Stud.

Bail reform is a complex matter. True reform requires that a careful balance be struck between the historical function of bail as a means to ensure the defendant's appearance at trial and the legitimate community safety concerns of the public. How to strike this balance is the fundamental challenge in bail reform.

## III. PREVENTIVE DETENTION: A SIMPLISTIC SOLUTION

The reform most often advanced as an alternative to existing federal law is preventive detention.[41] Under this theory, a person accused of a crime can be incarcerated until trial if the court determines that the suspect is likely to commit another crime if released on bail.[42] In 1969, a number of bills were introduced in Congress to amend the Bail Reform Act[43] to include preventive detention provisions.[44] Although Congress never enacted any of these proposals, it did include a preventive detention provision in the District of Columbia Court Reform and Criminal Procedure Act of 1970.[45] This statute permits the court to incarcerate a suspect prior to trial (1) if the suspect is charged with a dangerous crime and the government certifies that the suspect's past and present behavior indicates there are no release conditions which will ensure the safety of the community;[46] or (2) if the suspect is charged with a violent crime and has either committed another violent

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287, 326-27 (1974) ("it would not be unreasonable to conclude that the principal social function of the existing bail system (as it operates [in 1971] in New York City) is to prevent defendants from committing additional crimes, rather than from disappearing.") (footnotes omitted); *see* note 31 *supra* and accompanying text.

[41] *See, e.g.*, Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36 (1969); Mitchell, *supra* note 29; Address by Richard G. Kleindienst, Am. Trial Lawyers Ass'n (Jan. 30, 1970), *reprinted in Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 1187 (1970) [hereinafter cited as *Preventive Detention Hearings*]; Ryan & Carver, *supra* note 24, at 1.

[42] *See* H.R. Rep. No. 907, 91st Cong., 2d Sess. 82 (1970); Tribe, *supra* note 29, at 376-78.

[43] *See* notes 23-28 *supra* and accompanying text.

[44] *Preventive Detention Hearings*, *supra* note 41, at 517, 520, 529, 544, 573.

[45] Pub. L. No. 91-358, § 210(a), 84 Stat. 644 (codified at D.C. Code Encycl. § 23-1322 (West Supp. 1970)). The District of Columbia is the only jurisdiction in the United States with a formal preventive detention statute, and its enactment resulted in widespread debate. *See* N. Bases & W. McDonald, Preventive Detention in the District of Columbia: The First Ten Months 4-8 (1972). The debate continues today as Congress tries to make the statute more effective. *See Pretrial Release and Detention: Hearings on H.R. 7747 Before the Subcomm. on Governmental Efficiency and the District of Columbia of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (1978).

[46] D.C. Code Encycl. § 23-1322(a)(1) (West Supp. 1970). "Dangerous crime" is defined at *id.* § 23-1331(3).

crime within the past ten years or has allegedly committed the present crime while on bail or probation;[47] or (3) if the suspect is charged with any offense and "for the purpose of obstructing or attempting to obstruct justice, [he] threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror."[48] Before pretrial detention can be ordered under the statute, a judicial officer must conduct a hearing.[49] He must find that the imposition of any release conditions will not reasonably ensure the safety of the community, and that there is a substantial probability that the suspect committed the offense for which he is charged.[50] If the court orders pretrial incarceration, the defendant's case must be tried within sixty days.[51]

Preventive detention is a beguiling solution to the problem of crimes committed by people on bail. It is questionable whether such complete pretrial incarceration is constitutionally permissible.[52] Moreover, based on the experience in the District of Columbia, preventive detention appears to be an ineffective crime-fighting device not only because accurate predictions of a defendant's future criminality are difficult to make,[53] but also because statistics indicate that prosecutors are reluctant to use the statute. In 1977, there were approximately 1,500 cases in which the preventive detention statute could have been invoked. It was requested, however, in only forty cases and actually granted only thirty-four times.[54] Numerous reasons have been advanced for the government's hesitancy to use the statute. Prosecutors may be unable or unwilling to meet the requirements of the preventive detention hearing.[55] Further, because a preventive detention decision requires that the defendant's case be placed on an expedited trial schedule,[56] the government may be forced to prosecute the case sooner than it would otherwise desire.[57] Finally, there is rarely any need to invoke the statute because, at the prosecutor's request, the judge will normally impose unrealistically high money bail, which the defendant cannot raise, on the pretext that the defendant is likely to flee the jurisdiction.[58] The result is the same—preventive detention in disguise without the need to comply with due process requirements and an expedited trial date.

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[47] *Id.* § 23-1322(a)(2). Violent crime is defined at *id.* § 23-1331(4). If a person charged with a violent crime is a drug addict, he may be held in pretrial detention under supervision. *Id.* § 23-1323.

[48] *Id.* § 23-1322(a)(3).

[49] *Id.* § 23-1322(b).

[50] *Id.* This finding of substantial probability is not required to be made when the defendant is charged either with actually injuring or threatening a witness or juror, or attempting to do so. *Id.* § 23-1322(b)(2)(C).

[51] *Id.* § 23-1322(d).

[52] It has been argued that the pretrial detention permitted in the District of Columbia is contrary to the due process clause of the fifth amendment and the prohibition against excessive bail under the eighth amendment. *See Preventive Detention Hearings, supra* note 41, at 5-7 (statement of Sam J. Ervin, Jr.); Tribe, *supra* note 29. *But see* H.R. Rep. No. 907, 91st Cong., 2d Sess. 91-94 (1970); Meyer, *supra* note 1, (pt. II) at 1454; Mitchell *supra* note 29. *See generally* notes 29-30, 32 *supra*. For a summary of the debate surrounding preventive detention see Wald, *The Right To Bail Revisited*, in The Rights of the Accused 189-95 (S. Nagel ed. 1972).

[53] *See* note 35 *supra* and accompanying text. Indeed, the comprehensive sentencing reforms found in S. 1722, *supra* note 9—an end to the indeterminate sentence, *id.* §§ 2001-2009, the abolition of parole release, *id.* § 3824(a), and an end to the concept of rehabilitation as a justification for imposing a term of imprisonment, *id.* § 2302(a)—are a recognition by Congress that predictions of an offender's future criminal behavior cannot accurately be made. It is somewhat surprising, therefore, that those who advocate preventive detention are often in the vanguard of sentencing reform, acknowledging that predictions of future criminality cannot be made in the latter situation but refusing to accept the same premise with respect to bail. This inconsistency is all the more difficult to reconcile when one realizes that the bail decision involves an offender who has not yet been convicted of any crime, whereas sentencing reform efforts involve people already convicted.

The goal of bail reform should not be to jail more defendants pending trial but, rather, to develop a more rational policy for determining who should be released and on what conditions. What is needed is a more balanced approach, a middle ground between the polar opposites of preventive detention on the one hand and bail laws based solely on considerations of flight on the other. What is needed is the enactment of the bail provisions of S. 1722.

## IV. S. 1722: TOWARD A NEW SYSTEM OF BAIL RELEASE

The bail provisions of S. 1722 employ a two-step analysis. The first step incorporates existing law by requiring the court to make an initial bail release decision based solely on the likelihood of the defendant's future appearance at trial.[59] If it is determined that release of the defendant is appropriate, the court then considers whether the risk of the suspect fleeing the jurisdiction warrants the imposition of any additional restrictions.[60] Like the Bail Reform Act,[61] S. 1722 permits the imposition of a money bond in this first step only if the court finds that all other nonfinancial conditions are inadequate to ensure the defendant's appearance.[62]

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[54] Inslaw Study, *supra* note 4, at I-33.

[55] *Id.* at I-11; Ryan & Carver, *supra* note 24, at 6; *see* note 49-50 *supra* and accompanying text.

[56] *See* note 51 *supra* and accompanying text.

[57] Inslaw Study, *supra* note 4, at II-59.

[58] *See* Suffet, *Bail Setting: A Study of Courtroom Interaction*, in Crime and Justice in Society 292 (R. Quinney, ed. 1969); notes 39-40 *supra* and accompanying text.

[59] S. 1722, *supra* note 9, § 3502(a) ("A person charged with an offense . . . *shall* . . . *be ordered released* pending trial . . . unless the judge determines, in the exercise of his discretion, that such release will not reasonably assure the appearance of the person as required.") (emphasis added).

[60] *Id.* The release conditions which may be imposed to ensure the defendant's appearance include an order that the suspect "(1) remain in the custody of a designated person who agrees to supervise him . . . (2) abide by specified restrictions on his travel, associations, or place of abode . . . (9) execute an appearance bond in a specified amount and deposit in . . . court . . . a sum not

Once a decision to release a defendant on bail has been made, the court proceeds to the second step of the analysis and determines whether the release of the accused will endanger the community.[63] Thus, S. 1722 brings a refreshing candor to bail decisionmaking by expressly substituting the concept of community safety for what has heretofore been a *sub rosa* practice of the court. To remedy the unacceptable current practice in which judges use high money bail as a vehicle to jail defendants perceived to be dangerous,[64] S. 1722 prohibits the use of financial conditions in this second stage of the analysis.[65] If a defendant is deemed dangerous, the court should say so, and then use its discretion to impose appropriate nonfinancial conditions of

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to exceed ten percent of the amount of the bond, which deposit is to be returned upon the performance of the conditions of release; (10) execute a bail bond with solvent sureties, or deposit cash in lieu of such a bond." *Id.* § 3502(d). These conditions may also be imposed under present law. 18 U.S.C. § 3146 (1976).

[61] 18 U.S.C. § 3146 (1976); *see* notes 23-28 *supra* and accompanying text.

[62] S. 1722, *supra* note 9, expresses a preference that the accused be released "on his personal recognizance, or upon the execution of an unsecured appearance bond." *Id.* § 3502(a). If the court determines that neither of these methods is satisfactory, the judge is directed to impose "the least restrictive condition or combination of conditions of release set forth in subsection (d) that will reasonably assure the appearance of the person for trial." *Id.* The provisions relating to money bonds are the last specific conditions enumerated in subsection (d). *Id.* § 3502(d).

[63] "The court upon ordering [the] release of a person . . . shall determine, in the exercise of its discretion, whether such release will endanger the safety of any other person or the community." *Id.* § 3502(b). In making this determination, the court is directed to consider a number of factors, most of which have been drawn from existing law. *See* 18 U.S.C. § 3146(b) (1976). These factors are applicable to all bail release decisions made under S. 1722, whether based on flight or community safety, and include "(1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; and (3) the history and characteristics of the person, including his character, mental condition, family ties, employment, past conduct, length of residence in the community, financial resources, record of convictions; record of appearance, flight to avoid appearance, or nonappearance at court proceedings." S. 1722, *supra* note 9, § 3502(e). S. 1722 further expands this list of general factors to include considerations that are primarily directed to the issue of community safety such as "illegal drug use; whether [the suspect] was on probation, parole, or other release pending completion of sentence for a conviction . . . and whether he was on pretrial release or release pending sentence or appeal . . . at the time of the current arrest." *Id.* Statistically, a prior criminal record and a history of drug use seem to be strong positive indicators that the defendant is likely to commit a crime while free on bail. Inslaw Study, *supra* note 4, at III-29.

[64] *See* notes 39-40 *supra* and accompanying text.

[65] S. 1722, *supra* note 9, § 3502(b) ("No financial condition . . . may be imposed to assure the safety of any person or the community."). The District of Columbia provides a similar limitation. D.C. Code Encycl. § 23-1321(a) (West Supp. 1970). This safeguard, however, is not present in every bail statute which permits the court to weigh community safety considerations. *See, e.g.*, Alaska Stat. § 12.30.020(a) (Supp. 1979); Minn. R. Crim. P. 6.02; S.C. Code § 17-15-10 (1977).

release.[66] Federal law presently provides a number of release conditions which may be imposed upon a defendant to ensure his appearance at trial.[67] If one accepts the premise that the rights of the community should also be included in the bail decision, it logically follows that once a defendant has been ordered released on bail, similar conditions should be readily available to protect the community. Further, because the community safety consideration is not undertaken until the court has decided to release the accused, S. 1722 avoids the constitutional pitfalls of preventive detention.[68] Indeed, if such safety factors were considered at the time of the initial bail decision, it would constitute preventive detention.[69] Once the defendant has been ordered released, however, a new balance can be struck and the community's safety legitimately considered. Obviously, one can no more readily predict dangerous behavior in setting bail release conditions than one can in ordering preventive detention itself.[70] In the latter situation, however, an inaccurate prediction can result in complete incarceration before trial, whereas under S. 1722 the bail restrictions are imposed upon an offender who has been released pending trial.

If the judge determines that the suspect will pose a danger to the community, S. 1722 specifies a number of release conditions which may be imposed.[71] Perhaps the most important of these conditions is a new, mandatory requirement that the suspect not commit a crime while on bail.[72] Although such a requirement has traditionally been considered self-evident,[73] the drafters of S. 1722 wanted to make the requirement express because a violation of this condition permits summary revocation of bail through the use of the court's contempt power.[74] S. 1722 also permits the court to impose conditions which heretofore had been imposed only when a defendant was released on probation.[75] These restrictions are designed to safeguard the community and include conditions requiring the suspect to report on a regular basis to law enforcement agencies[76] and to refrain from excessive use of alcohol or drugs.[77] Additionally, other conditions require that the accused not possess a dangerous weapon,[78] and that he agree to undergo any needed medical or psychiatric treatment.[79]

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[66] *See* note 71 *infra* and accompanying text. Allowing the court to consider danger to the community would alleviate arbitrary bail decisions. *See* note 40 *supra* and accompanying text.

[67] 18 U.S.C. § 3146 (1976), *see* notes 23-28, 60 *supra* and accompanying text.

[68] *See* note 51 *supra*.

[69] *See* note 42 *supra* and accompanying text.

[70] *See* note 35, 51-52 *supra* and accompanying text.

[71] S. 1722, *supra* note 9, § 3502(d); *see* notes 60 *supra*, 76-79 *infra* and accompanying text.

[72] S. 1722, *supra* note 9, § 3502(c) ("The judge shall provide as an explicit release condition for any person ordered released pursuant to this subsection, that the person not commit a federal, [s]tate, or local crime during the period of his release.").

[73] Bitter v. United States, 389 U.S. 15, 16 (1967) (per curiam); United States v. Kirk, 534 F.2d 1262, 1280-81 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977); United States v. Cozzetti, 441 F.2d 344, 350 (9th Cir. 1971); United States v. Gilbert, 425 F.2d 490, 491-92 (D.C. Cir. 1969); United States v. Clark, 412 F.2d 885, 890 (5th Cir. 1969); United States v. Fogel, 395 F.2d 291, 293-94 (4th Cir. 1968).

[74] S. 1722, *supra* note 9, § 3507(a) ("A person . . . who has violated a condition of release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court."). In such a case, pretrial detention is based not on unreliable predictions of future criminal behavior but on the violation of an existing bail condition. Such procedures governing revocation

By adopting a middle course based on the notion of community safety in the formulation of conditions of release, S. 1722 clearly rejects the type of preventive detention statute currently found in the District of Columbia.[80] Nevertheless, S. 1722 does include an omnibus provision, known as condition eleven, which permits the court to impose severe custodial restrictions when it finds that the defendant's release poses a danger to the community which cannot be alleviated by the imposition of less restrictive conditions.[81] While condition eleven does not foreclose the possibility of some form of pretrial detention in rare cases,[82] it is conspicuously silent both as to the prerequisites which must be met before such detention can be imposed and as to the nature of that detention.[83] How close this provision comes to actual preventive detention will ultimately depend upon how the courts use it. There are, however, several indications that the drafters of S. 1722 do not intend that the court remand the suspect to jail for the entire pretrial

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of bail have been urged for many years. *See, e.g.*, Hall, *Subsequent Misconduct as Ground for Forfeiture of the Right to Release on Bail—A Proposal*, 15 N.Y.L.F. 873 (1969).

[75] Present law does not specifically list conditions of probation but provides that their imposition be "upon such terms and conditions as the court deems best." 18 U.S.C. § 3651 (1976). The conditions enunciated in S. 1722, *supra* note 9, § 3502(d), fall well within the ambit of this general language. *See* United States v. Pastore, 537 F.2d 675, 679-81 (2d Cir. 1976); Note, *Judicial Review of Probation Conditions*, 67 Colum. L. Rev. 181, 182-88 (1967).

[76] S. 1722, *supra* note 9, § 3502(d)(4).

[77] *Id.* § 3502(d)(5).

[78] *Id.* § 3502(d)(7).

[79] *Id.* § 3502(d)(8). S. 1722 also contains a condition that the defendant avoid all contact with potential witnesses who may testify concerning the offense. Witnesses are often intimidated by those released on bail and this new condition enables the court to restrict defendant's access to potential witnesses before actual intimidation occurs. *Id.* § 3502(d)(6).

[80] *See* notes 45-51 *supra* and accompanying text.

[81] Condition eleven permits the court to require a defendant to "satisfy any other condition reasonably necessary to assure appearance as required . . . and to assure the safety of any other person or the community . . . including a condition requiring that the person return to official detention after specified hours or during specified periods, and abide by such other severe restrictions on the person's freedom, associations, or activities that the court deems appropriate." S. 1722, *supra* note 9, § 3502(d)(11). If a defendant is subjected to severe custodial restrictions under condition eleven, S. 1722 requires that he be "brought to trial expeditiously." *Id.* § 3502(d).

[82] S. Rep. No. 553, 96th Cong., 2d Sess. 1078-79 (1979).

[83] Condition eleven is drafted in general terms and does not specifically state what severe

period. First, condition eleven cannot be invoked unless and until a pretrial bail release decision, based solely on the likelihood of flight, has been made. Thus, it is different from the release/detain decision which the court must render prior to considering conditions of release based on community safety. Second, condition eleven is, after all, designated a *release* condition. The court, therefore, should not in the first step decide to release a defendant, and then in the second step determine that the appropriate release condition is complete incarceration under condition eleven. Finally, one must recognize that condition eleven has its genesis in a section of the Bail Reform Act known as the specified hours provision.[84] S. 1722 adopts this concept and applies it not only to the defendant's trial appearance but also to safeguard the community. The present specified hours condition expressly permits some form of pretrial incarceration but stops short of preventive detention.[85] It is this provision which should guide the courts in their interpretation of condition eleven.

## CONCLUSION

Current bail practices constitute a major flaw in our existing criminal justice system because they fail to protect the interests of both the community and the accused. S. 1722 attempts to balance this equation. The bill is designed to deal with the growing problem of crimes committed by defendants while on bail through the innovative use of the concept of community safety in imposing bail release conditions. At the same time, S. 1722 attempts to bring new candor to the bail release decision by ending abusive practices whereby preventive detention is achieved by requiring high money bail on the pretext that a defendant is likely to flee the jurisdiction.

Effective bail reform presents an enormous challenge to those responsible for creating an equitable criminal justice system. We must no longer think in terms of the all-or-nothing solutions of the past—preventive detention versus bail release based solely on the likelihood

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restrictions on the person's freedom are actually contemplated. S. 1722, *supra* note 9, § 3502(d)(11). Obviously, the entire panoply of possible restrictions cannot be listed in the statute. Nevertheless, it is intended that condition eleven be invoked only when the other conditions, specifically listed, cannot, in the court's discretion, effectively preserve community safety. The drafters of S. 1722 have inadvertently erred in failing to specifically state this intention. Compare note 62 *supra* and accompanying text.

[84] Under this provision, a court may impose "a condition requiring that the person return to custody after specified hours." 18 U.S.C. § 3146(a)(5) (1976).

[85] *Id.*

of flight. We must replace alternatives found wanting with more workable approaches. The bail provisions of S. 1722 constitute such an approach. They must be studied and debated in the current session of Congress.[86]

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[86] S. 1722, *supra* note 9, was reported out of the Senate Judiciary Committee on December 4, 1979, by a vote of 14 to 1. It is scheduled to be debated on the floor of the United States Senate sometime this spring.

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# PRETRIAL DETENTION AND THE 1970 DISTRICT OF COLUMBIA CRIME ACT—THE NEXT STEP IN BAIL REFORM

*Frederick D. Hess*†

## INTRODUCTION

On July 29, 1970, President Richard M. Nixon signed into law the District of Columbia Court Reform and Criminal Procedure Act of 1970.[1] Contained within this Act is a measure instituting, in the nation's capital, pretrial detention of dangerous defendants.[2] This legislation effects a basic change in the federal statutory bail law, which law has been in existence since 1789.[3] This article will examine the existing federal bail system and the underlying reasons for changing that law, including an examination of the troublesome problem of obtaining accurate crime-on-bail statistics and a review of selected foreign bail practices. In addition, the provisions of the new law will be examined in detail and the outline of a constitutional argument in favor of pretrial detention will be presented.

## I. THE EXISTING BAIL SYSTEM

### A. *Hypocrisy and Bail*

In the early 1960's the nation's bail practices became a target of major criticism from numerous observers.[4] In essence, the critics charged that the existing system conditioned pretrial freedom on the availability of financial resources, leading principally to the incarceration of the indigent and the ghetto dweller. Most courts throughout the country operated on bail schedules, with a set sum of money bond being fixed according to the offense charged and bearing no relation to the individual defendant.[5] If the accused had the money to post bond himself, or to pay the premium for a bondsman, he went free, if not he remained in jail until tried. Often the release decision was not that of the court but that of the bondsman. Even if the defendant could afford the bondsman, it was the bondsman and not the judge, who weighed the risk of the individual defendant's return.[6] Very little consideration was given by the courts either to the likelihood that the accused would appear for trial or to an individual examination of his community contacts.[7] Under this system the ease with which the courts could detain a defendant believed to be dangerous is obvious. As long as the accused could be required to post a money bond for his pretrial freedom, the sum could easily be manipulated to deny that freedom. Since most defendants were poor, the sum set did not have to be so large as to raise obvious constitutional questions of excessive bail.

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† Attorney, Criminal Division, Department of Justice. Member of New York and District of Columbia Bars. B.A. Columbia, 1958; J.D. Brooklyn Law School, 1967. Member of the Drafting Team of the 1970 D.C. Crime Act.

The views expressed in this article are solely those of the author and do not necessarily reflect the position of the Department of Justice.

[1] Pub. L. 91-358, 84 Stat. 473 et seq. (1970). [Hereinafter cited as the D.C. Crime Act.]

[2] Id., Title II, § 210, ch. 13, subch. II §§ 23-1321-32.

[3] See Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91.

[4] See, e.g., Freed and Wald, Report to the National Conference on Bail and

The criticism leveled at this monetary bail system stressed the fact that many detained defendants could readily be relied upon to return for trial because their extensive contacts with the community outweighed the risk of flight. Experiments proved the validity of the release on recognizance concept, and pressures for its expanded use mounted.[8] One result of this pressure and criticism was the enactment, for the federal courts, of the Bail Reform Act of 1966.[9] Its purpose was to "revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . ."[10]

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Criminal Justice: Bail in the United States (1964) [Hereinafter cited as Bail in the United States]; Proceedings and Interim Report of the National Conference on Bail and Criminal Justice (1965); Ares, Rankin and Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole, 38 N.Y.U.L. Rev. 67 (1963); McCarthy and Wahl, The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change, 53 Geo. L.J. 675 (1965).

[5] Bail in the United States, supra note 4, at 18-19.

[6] See Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

[7] Bail in the United States, supra note 4, at 18.

[8] Among the studies reported were: Ares, Rankin and Sturz, The Manhattan Bail Project, supra note 4; Committee on the Administration of Bail of the Junior Bar Section of the Bar Association of the District of Columbia: The Bail System of the District of Columbia (1963); Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 58-89 (1963).

[9] 18 U.S.C. §§ 3146-52 (Supp. IV, 1969).

[10] Bail Reform Act of 1966, P.L. 89-465, § 2, 80 Stat. 214 (1966). The object of

To achieve the elimination of needless pretrial detention, the Act mandates that all persons charged with noncapital offenses are to be released on personal recognizance, or on an unsecured appearance bond, unless the judicial officer determines, in the exercise of his discretion, that such a release will not jeopardize the appearance of the defendant for trial.[11] Only when he determines that a risk of flight exists, can the judicial officer impose one of a list of conditions, ranging from third-party custody and restrictions on travel and association, to traditional money bond.[12] Judicial interpretations of the Bail Reform Act in the District of Columbia, as well as its legislative history, make it clear that the Act creates a presumption in favor of release on personal recognizance or upon the execution of an unsecured appearance bond.[13] It is equally clear that traditional money bond has been placed near the bottom of the hierarchy of release conditions.[14]

The Bail Reform Act has been criticized because of its failure to permit consideration of the potential danger that some noncapital defendants may pose to the community.[15] The criticism is answered by the assertions that the only proper criterion for release on bail has always been accused's appearance for trial, and that danger to the community has never been a test for determining bail.[16] While this claim is open to challenge,[17] it is apparent that, whatever the proper test for release might be, danger to the community is, and always has been, a major bail consideration.[18] The Bail Reform Act does two things. First, it

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the Bail Reform Act has been supported by all recent Administrations and several Attorneys General. See statement of Hon. Ramsey Clark at Hearings on Proposals to Modify Federal Bail Procedures Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 22-24 (1965); statement of Hon. John N. Mitchell in support of Proposed Amendments to the Bail Reform Act of 1966 before the Committee on the Judiciary of the House of Representatives, October 21, 1969, at 2.

[11] 18 U.S.C. § 3146(a) (Supp. IV, 1969).

[12] Id.

[13] United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969); S. Rep. No. 750, 89th Cong., 1st Sess. 10 (1965).

[14] United States v. Leathers, supra note 13.

[15] See statement of Hon. John N. Mitchell, supra note 10, at 7. Congress made it clear that it was putting aside the issue of pretrial detention to ensure community safety in order to deal with the money bail problem. H.R. Rep. No. 1541, 89th Cong., 2d Sess. 6 (1966).

[16] Hearings on Preventive Detention Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. 5 (1970) (Statement of Sen. Ervin). [Hereinafter cited as Hearings on Preventive Detention.]

[17] Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 Va. L. Rev. 1223, 1230 (1969).

[18] Advisory Committee on Pretrial Proceedings, Report to the American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Pretrial Release 6 (Tentative Draft 1968); The President's Commission on Law

articulates[19] danger of flight as the sole permitted test for release, and second, it requires personal recognizance to be the presumed method of release. The result is that the statute deprives the court of the power that it has traditionally exercised to manipulate money bail in order to detain the dangerous defendant. The Bail Reform Act, in essence, labels this traditional use of money bond to assure community safety as extra-legal. Yet, the practice continues to be widespread;[20] many defendants are plainly held on money bail, in the District of Columbia, because they are deemed to be dangerous,[21] despite the Bail Reform Act and in the face of clear judicial direction to the contrary.[22] Such practices are patently hypocritical and engender gross disrespect for the law.

The Bail Reform Act itself treats the issue of dangerousness illogically. While the Act decrees that danger of flight is to be the sole test for release in pretrial noncapital cases, it further mandates that in pretrial capital cases danger to the community is to be considered in making the release decision and that release itself in such cases can be denied.[23] This mandate introduces directly and specifically the legislative concept of community danger as a release test, for the first time in federal bail his-

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Enforcement and Administration of Justice, Report: The Challenge of Crime in a Free Society 131 (1967).

[19] The first federal statute to discuss bail, the Judiciary Act of 1789, supra note 3, merely stated that bail was permitted in all noncapital cases. In 1793 a statute was passed stating which judges could grant bail "for appearance in any court of the United States." Act of March 2, 1793, ch. 22 § 4, 1 Stat. 334. By 1873 the words "for appearance" had been dropped from the statute designating which judicial officers could take bail and instead, after listing the officers, it read "for any crime or offense against the United States the offender may . . . be . . . bailed . . . for trial . . . ." U.S. Stat. at Large, 1873-4, 43d Cong., R.S. § 1014. The phrase "for trial" continued in use until the Bail Reform Act was passed. See 18 U.S.C. § 591 (1940), R.S. § 1014; 18 U.S.C. § 3041 (1964). However, the statute that specifically permitted bail in noncapital cases did not list any criterion for the release test. U.S. Stat. at Large, 1873-4, 43d Cong., R.S. § 1015, 18 U.S.C. § 596 (1940), R.S. § 1015; 18 U.S.C. § 3141 (1964). Any confusion caused by these statutes as to the proper release test in federal cases is clarified by the Bail Reform Act. 18 U.S.C. § 3146(a) (Supp. IV, 1969).

[20] Hruska, Preventive Detention: The Constitution and the Congress, 3 Creighton L. Rev. 36, 38-39 (1969); A.B.A. Project on Minimum Standards for Criminal Justice: Standards Relating to Pretrial Release, supra note 18, at 6.

[21] Money bond has been found to be more frequent for violent and dangerous crimes. See National Bureau of Standards, Technical Note 535, Compilation and Use of Criminal Court Data in Relation to Pretrial Release of Defendants: Pilot Study (August 1970) 129-30. [Hereinafter cited as National Bureau of Standards Study.] See also Reynolds and Fitch, The Bail Reform Act and Pretrial Detention, Report to the Office of Criminal Justice, United States Department of Justice, Sept. 5, 1967, reprinted in Hearings on Amendments to the Bail Reform Act of 1966, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 648 (1969). [Hereinafter referred to as Hearings on Amendments to the Bail Reform Act.]

[22] United States v. Leathers, supra note 13.

[23] 18 U.S.C. § 3148 (Supp. IV, 1969).

tory.[24] However, the effect of this statutory scheme is to create an anomaly. It requires the judicial officer to base his release decision in one set of cases solely on flight and in another on both flight and community danger. Yet, the most common capital cases, murders, are generally committed by a relative of the victim or a person acquainted with the victim,[25] therefore, the risk to the community, if the accused is released, is very slight. Moreover, the distinction is an extremely arbitrary one. If a person with a long record of violent offenses commits an armed robbery, and in the course of the crime shoots his victim, the decisive element in granting the court power to detain on the basis of dangerousness is whether or not the wound inflicted is fatal. If death does not result, the only release standard is risk of flight. Furthermore, the longer a defendant's criminal record is, the more likely he is to have been released on bail in the past and to possess a good record for appearing in court.[26] In noncapital cases, under the Bail Reform Act, this defendant might well be a candidate for personal recognizance.

no reasons for dual standard of bail release

There can also be little question that, no matter what the statute requires, many judges simply will not turn an obviously dangerous defendant loose on society if they can avoid doing so by a manipulation of money bond.[27] As a result, judges are placed in the position of ordering a defendant held on bond; hypocritically using risk of flight as the reason when, in reality, it is a potential danger to society that has animated the decision. Thus, the statutory scheme of the Bail Reform Act often presents the judicial officer with a cruel choice. When faced with a defendant he deems dangerous, a federal judge is required either to follow the clear dictates of the Act and grant pretrial release, or to fulfill his equally clear duty to protect society and detain the defendant on money bond. By failing to realize that dangerousness is a consideration that judges do recognize, the Act does not face the practical realities of bail decision making, and thus fosters the continuation of hypocrisy in the law.

Coupled with its failure to recognize the fact that courts should and do consider dangerousness in making release decisions, the statute also fails to provide for an adversary hearing directed to the crucial release issue. Bail hearings under the Act are quick and summary proceedings; all that is presented to the court are the facts of the offense charged and the defendant's criminal record as related in the police "rap" sheet which is often incorrect and incomplete.[28] At a hearing specifically directed to the issue of dangerousness, the accuracy of the existing criminal record would take on far more importance and would be subject to intensive defense investigation and challenge. Under the present system, the criminal record, which is obviously a most significant item in predicting future dangerousness, is an unchallenged statement from police sources. Decisions as to dangerousness are thus often based on incomplete and possibly inaccurate information.

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[24] Supra note 19.

[25] Federal Bureau of Investigation, Crime in the United States—Uniform Crime Reports, 1969, at 8 (1970).

[26] The accused's history of past court appearances must be considered in all release decisions in the District of Columbia. Wood v. United States, 391 F.2d 981 (D.C. Cir. 1968).

[27] One District of Columbia judge testified that anytime he has someone before him charged with an offense, who is already out on bond for another offense, he automatically sets $10,000 money bond. Hearings on Amendments to the Bail Reform Act, supra note 21, at 111 (Statement of Judge Halleck).

Inevitably, many dangerous defendants are released because some judges strive to obey the Bail Reform Act; just as inevitably, many dangerous defendants are detained because other judges violate the Act to protect the community. Since the decision to release or to detain on the issue of dangerousness is never openly argued or articulated, it is quite likely that many of those who are presently detained, if granted a hearing directed to the flight issue, would be released.

To the extent that the Bail Reform Act seeks to legislate the results of the experiments with personal recognizance, it is clearly successful. Yet, to the extent that it was hoped that the Act would serve as a model for the states, it has failed. In the four years since its enactment, the states have proved most reluctant to adopt the Act and, in fact, have headed in an opposite direction towards more restrictive release statutes.[29] In addition, the continued use of money bond, resulting in the present high rate of pretrial detention,[30] indicates that the Act has also failed in its basic purpose of reducing needless pretrial detention. Both of these failures stem from the fact that the Bail Reform Act does not address itself to a significant element in the release decision—the issue of protecting society from the dangerous defendant

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[28] Id. at 106-07.

[29] See Appendix to text at pp. 320-22 infra.

[30] In a recent study of 654 defendants formally charged, money bond was set in 352 cases (54 per cent), of which 113 were felonies and 239 were misdemeanors; at least 176 of those for whom money sums were set (50 per cent) were not released. National Bureau of Standards Study, supra note 21, at 122, 130 (Table X and XII).

This author has often wondered at the vehemence of the critics of pretrial detention who believe that its enactment will result in droves of defendants being incarcerated and yet do not seem as concerned about the droves who are already being held with few of the protections afforded them by the pretrial detention provisions of the D.C. Crime Act. Supra note 1, § 23-1322. The state of present day pretrial detention is appalling. On May 15, 1970 the combined District of Columbia detention facilities, with a capacity of 3,053 prisoners, housed 3,275. Of these 1,408, over 40 per cent, were in jail awaiting trial, and, of that group, 675 were held over 60 days and 149 over one year without trial. Hearings on Preventive Detention, supra note 16, at 11 (Statement of Sen. Ervin). In New York City it was reported that on August 12, 1970 the Manhattan House of Detention for Men, popularly known as the "Tombs," with a capacity of 932 prisoners, had a population of 1,815, virtually all of whom were awaiting trial. N.Y. Times, August 18, 1970, p. 40, col. 1 (city ed.).

The decision to enact an open system of pretrial detention, where the issue of dangerousness can be directly litigated at an adversary hearing, is based, pragmatically, on the fact that the courts do consider dangerousness in reaching decisions on pretrial release. The decision is further motivated by the desire to end a hypocritical system that not only incarcerates many defendants before trial, but does so with only the barest shadow of procedural due process.

### B. *The Statistical Morass*

The most heated controversy in the current national debate over pretrial detention concerns the need for, and the availability of, statistics showing the true rate of crime committed on bail. The wide disparity of views on the subject can be seen in two reactions to a recent statistical study of pretrial release of defendants conducted by the National Bureau of Standards.[31] Senator Sam Ervin of North Carolina, based on his reading of the findings, concluded that the arrest rate for violent crime committed while on bail was five per cent; he stated that: "[T]he assumption that persons arrested for dangerous or violent crimes have a high propensity to be arrested for subsequent offenses of a serious nature, turns out to be wrong."[32] Deputy Attorney General Richard Kleindienst testified, in relation to the same study, that: "If nothing else, the N.B.S. report confirms our contention that a substantial amount of crime is being committed by persons released on bail; correspondingly, it undermines the assertion that 'offenses committed by persons released on bail are approximately six per cent of the total crime figure.' "[33] Both of these statements represent findings made in the Study, depending on the manner in which the data is examined, and the disparity illustrates the problem of using statistics in this area.

The essential problem is that accurate statistics showing the true rate at which those free on bail commit crimes simply cannot be obtained. The problem in amassing crime-on-bail statistics is threefold. First is the low solution or clearance rate for crimes committed and reported to the police. In 1969, the nation's police cleared only 27 per cent of all reported robberies, 19 per cent of burglaries and 56 per cent of forcible rapes.[34] As a result, statistics that deal with crime on bail, and which necessarily must start from the point of arrest or indictment, can never accurately reflect all the crime that is committed on bail simply because many crimes go unsolved. Second, the total amount of crime actually committed is estimated to be higher than the reported rate, by as much as 50 per cent for some crimes.[35] Again, this would bias any statistics showing crime committed on bail. Third, there is the existing *sub rosa* practice by which courts incarcerate many defendants because they deem them dangerous, and this militates against an accurate estimate of the potential rate of crime on bail, at any one time, because many of those who presumably would be likely to commit additional offenses are not released.[36]

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[31] Supra note 21.

[32] Hearings on Preventive Detention, supra note 16, at 14.

[33] Id. at 74.

[34] Federal Bureau of Investigation, Crime in the United States—Uniform Crime

An examination of these factors indicates, that whatever rate of crime on bail is reported by any one study, the true rate will be much higher because each of these three factors reduces the amount of crime on bail included in any study. In discussing just one of these factors—the large number of crimes that are committed for which no arrests are made—the National Bureau of Standards Study noted that, with a monthly average of 5,600 offenses, the police in the District of Columbia cleared or made arrests in an average of 1,700 cases.[37] On the basis of these figures, the Bureau arrived at an estimated clearance rate of 30 per cent with no arrests in some 70 per cent of all reported crimes. The Study went on to state that if the defendants who were not arrested were assumed to be distributed between the recidivist and non-recidivist cases in the same ratio as the sample, the true recidivist rate might rise from the 11 per cent shown by the sample to 37 per cent.[38] It was this suggestion that led to the Deputy Attorney General's statement.[39]

Thus, the rate of crime committed on bail that is reported by any study will only be that irreducible minimum that filters through the low arrest and crime reporting rates. In spite of these inherent problems, a number of studies have been conducted in recent years and their results are instructive.

The first such study was conducted by the President's Commission on Crime in the District of Columbia. Faced with the

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Reports, 1969, at 30, chart 17 (1970). [Hereinafter cited as Uniform Crime Reports, 1969.]

[35] The Challenge of Crime in a Free Society, supra note 18, at 21.

[36] See notes 20-22, supra.

[37] National Bureau of Standards Study, supra note 21, at 133.

[38] Id.

[39] Senator Ervin reached the figures he quoted by concentrating solely on the rate with which persons charged with violent crimes were rearrested for other violent crimes while eliminating all other arrests. Hearings on Preventive Detention, supra note 16, at 13-14.

absence of any collected data on crime committed among persons released on bail, the Commission studied the cases of all persons who, after being held for action by the grand jury on felony charges, were released on bail between January 1, 1963, and October 8, 1965. Of 2,776 persons released on bail, 7.5 per cent (a total of 207) were later rearrested on one or more felony charges.[40] The persons rearrested tended to be charged with crimes of the same type and degree of seriousness as the original offense; there was a high incidence of prior arrests and convictions (88 per cent) among this group.[41] While the figure of 7.5 per cent seems low, it was sufficient to convince a majority of the Commission that the incidence of crime on bail was serious enough to warrant enactment of pretrial detention.[42]

A second major study of the incidence of crime on bail was conducted by the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, commonly called the Hart Committee. This Committee issued reports in May, 1968, and May, 1969. This study was directed at determining the rate of reindictments for felonies in 1967 and 1968. Approximately 9 per cent (59 out of 671) of the persons released on bail pending trial during the first six months of 1967 were reindicted for offenses allegedly committed within six months of pretrial release.[43] The following year the Committee reported data on the incidence of reindictments during the calendar year 1968. Of 2,098 persons indicted, 7 per cent (a total of 147) were reindicted while released on pretrial bail.[44] The Committee indicated its awareness that the reindictment rate does not measure the full range of crime on bail. For instance, it excluded many incidents that did not result in indictments as well as crimes allegedly committed by misdemeanants who were on bail. As could be expected, it did not reflect the unreported and unsolved crimes which may have been committed by persons on bail. The Committee concluded that the figure they set forth "measures only the most serious and possibly the lowest incidence of crime on bail."[45] Paralleling the experience of the D.C. Crime Commission, a majority of the Hart Committee recommended enactment of pretrial detention for the nation's capital.[46]

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[40] Report of the President's Commission on Crime in the District of Columbia 514 (1966). [Hereinafter cited as the D.C. Crime Commission.]

[41] Id. at 518.

[42] Id. at 527. Some of the Commission's observations point up one of the major disputes that rages over bail statistics. Opponents of pretrial detention not only insist on ascertaining accurate statistics as a prerequisite to legislation, despite the problems such a goal poses, but also insist that the only valid rate to measure is that of ultimate conviction. See Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, 20, n. 2 (1969). [Hereinafter cited as Hart Committee 1969 Report.] They assert that to measure rearrest rates, as the D. C. Crime Commission did, is to bias the results because often convictions do not result. At first blush, a breakdown of the Commission's figures bears out this assertion. The 207 defendants in the study, who were rearrested while released, had been originally arrested and bailed on some 242 different felony charges. At the time the data was amassed 123 of these charges had resulted in convictions and some 52 had resulted in no convictions. These 207 defendants were subsequently rearrested for a total of 253 felonies allegedly committed while on bail. Of these subsequent cases terminated at the date the data was collected, only 97 had resulted in convictions and 113 had not. D.C. Crime Commission, supra, note 40, at 516 (Table 5). Quick analysis of these figures would suggest that a significantly high percentage of defendants arrested while released on bail are never convicted and thus may well be innocent. Closer analysis reveals an entirely different picture. Of the total of 207 defendants, 200, all but 7, had been convicted of at least one charge, either the original one or one of those committed while released on bond. Id. at 515. The large number of dismissals, the Commission reported, was attributable to prosecution policy not to proceed to trial against a person already convicted of one offense. This factor is the result of overcrowded courts and calendars as well as plea bargaining. Id. at 514. Thus, relying solely on conviction rates, in determining the extent of crime on bail, ignores the everyday practical realities of how the overworked criminal justice system in fact works, and the factor of a rearrest while on bail takes on far more weight.

Another study, conducted by the United States Attorney's office in the District of Columbia, was directed only at the 557 defendants who were indicted in 1968 for robbery. Of this total, 345 were released, while 212 could not meet the release condition set (in most cases money bond) and remained in custody. Obviously, many of the 212 who were not released were deemed dangerous by experienced judicial officers who utilized the traditional *sub rosa* method of pretrial detention by the use of money bond. Yet, of the 345 supposedly less dangerous defendants who were released, 242, or 70 per cent, were subsequently rearrested while on bail.[47] The figure of 70 per cent is such a staggering figure that the Hart Committee attempted to verify it. Taking a sample of 140 (out of the full group of 557 1968 robbery defendants), of whom 105 were released, the Committee reported that of those released, 63.7 per cent (65 out of the 105) were rearrested,[48] thus basically confirming the United States Attorney's office study of robbery defendants. It can be argued that these figures constitute clear evidence that robbery defendants, as a group, represent major risks for repeated crimes if released on bail.

In July of 1968, the District of Columbia Metropolitan Police Department undertook a study of those persons indicted for armed robbery and released on bond in fiscal 1967. This study, as interpreted by the Hart Committee, revealed that of 130 defendants indicted for armed robbery about 30 per cent (a total of 41) were indicted for at least one felony while on bail.[49] This study has been the subject of a considerable amount of criticism directed towards its methodology and accuracy.[50] Nevertheless, it appears that the reindictment figures for robbery are considerably higher than the 7 to 9 per cent felony rearrest rates found by the D. C. Crime Commission and the Hart Committee.

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[43] Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, 45 (1968). [Hereinafter cited as the Hart Committee 1968 Report.] In the following year the Committee extended this six-month survey to cover 10 months. The 10 month rate of reindictment was 9.4 per cent (143 out of 1,513). Hart Committee 1969 Report, supra note 42, at 19 (Table 1).

[44] Hart Committee 1969 Report, supra note 42, at 19 (Table 1).

[45] Id. at 20. The Committee also indicated that this figure might be reduced by an unknown number of cases that result in acquittal or dismissal. Id.

[46] Id. at 32.

[47] Statement of Attorney General John N. Mitchell, supra note 10, at 4.

[48] Hart Committee 1969 Report, supra note 42, at 20-21.

The final study to be conducted to date was prepared by the National Bureau of Standards under a grant from the Law Enforcement Assistance Administration of the Department of Justice. It was clearly the most careful and precise study to date. The National Bureau of Standards study covered four randomly selected weeks during 1968.[51] During those four weeks a total of 654[52] defendants were charged with felonies or misdemeanors. Of these 654 defendants, 426 were released prior to trial and, of these, 11 per cent (a total of 47) were subsequently rearrested on another charge.[53]

The Study further examined the records with direct relation to the Administration's pending pretrial detention proposal which ultimately was enacted in the D. C. Crime Act. As will be fully described later in this article,[54] defendants who may be subjected to pretrial detention hearings are broken down primarily into those charged with "crimes of violence"[55] and those charged with "dangerous crimes."[56] Of those charged with crimes of violence who were released, 17 per cent (18 out of a total of 106) were subsequently rearrested; of those charged with dangerous crimes who were released, 25 per cent (17 out of a total of 68) were subsequently rearrested.[57] These figures are significantly higher than the 11 per cent rearrest rate for the entire sample. This led the National Bureau of Standards to conclude that defendants in the dangerous crimes category "can be expected to produce a much higher recidivist rate—about 3 to 4 times as high as for those in the non-dangerous category."[58]

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[49] Id. at 22. The Hart Committee 1969 Report refined some of the original Metropolitan Police Department figures. The original report, Survey of the Apparent Abuse of the Bail Release System—A Study Prepared for the Metropolitan Police Department, Washington, D.C. by Robert E. Reiver, July 24, 1968, is set out in Hearings on Preventive Detention, supra note 16, at 1020.

[50] See Analysis of Metropolitan Police Department's Study Concerning Crime on Bail, January 22, 1969, Office of Criminal Justice, Department of Justice, in Hearings on Preventive Detention, supra note 16, at 1027-28.

[51] The Study covered weeks 1, 7, 22 and 24 in Calendar 1968. National Bureau of Standards Study, supra note 21, at 4.

[52] The full sample covered 712 defendants, but some 58 either were not charged or disposed of in some other manner. Id. at 122 (Table X).

[53] Id. at 131. The Study data also indicated the continued and widespread use of money bond, despite the Bail Reform Act's emphasis on nonfinancial release conditions and local appellate decisions. See United States v. Leathers, supra note 13. The initial bail settings for the 654 defendants break down as follows: of 217 felony defendants, 52 per cent (113) had money bond conditions set; of 437 misdemeanants, money bond was set for an even larger percentage—55 per cent (239). National Bureau of Standards Study, supra note 21, at 130 [Table XII (a)]. A total of 176 defendants covered by the sample were never released at all (27 per cent of the 654). Id. at 122 (Table X). The same table also reveals that there were some 11 defendants in jail, presumed not to have been released, for whom there was no full record available. This would raise the number detained to 187 and the percentage to 29 per cent.

[54] Infra notes 121-27 and accompanying text.

[55] D.C. Crime Act, supra note 1, § 23-1331(4).

The statistics amassed by the National Bureau of Standards, only highlighted here, would seem to indicate that the problem of crime on bail is a significant one and that the categories contained in the D.C. Crime Act are, at the very least, well directed. This Study, however, is subject to a number of caveats and cautions. The Study itself takes great pains to stress the limitations of the data. It is perhaps these limitations that are the most significant factors reported in the National Bureau of Standards Study, because they serve to underline the difficulties that make accurate statistics of crime on bail impossible to collect. The first problem affecting the collection of data is the extreme difficulty in obtaining accurate information from the current court system. The D.C. Crime Commission, in 1967, bemoaned the situation in these words: "Information is either nonexistent, incomplete, unassembled, or incompatible at every stage of the criminal process—from offense to arrest, trial, conviction, sentencing, incarceration, release, and aftercare."[59] While efforts to correct this situation have been made, tracing the course a defendant may follow through the District of Columbia courts and records is a herculean task. Thus the National Bureau of Standards Study found that bail histories can never be found in one place or in one document, and reconstruction from the records in the court system was extremely difficult and was probably rarely complete.[60] Inaccurate and incomplete information was found at every stage of the record-gathering system. Months of work were thus required to amass a study covering less than one thousand defendants in one randomly selected four-week period.

The size of the sample is another drawback. It covered a total of 712 defendants in a system where 5,600 offenses are reported and 1,700 arrests are made monthly.[61] The Study Report stated that it was difficult to draw reliable conclusions because of the small size of this data base.[62] Another limitation concerns crimes committed in other jurisdictions by those released on bail by the District of Columbia. The National Bureau of Standards Study, as well as the others, only concerned itself with rearrests or re-indictments within the District of Columbia. The Study, however, obtained Crime Career Records from the Federal Bureau of Investigation on a portion of its sample but found the data too limited in time sequence for effective use. Experience with these records indicates that about 30 per cent of all arrests contained in the Bureau's Crime Career files do occur in geographic jurisdictions other than the defendant's primary location. If the full sample could be pursued throughout the country, some 30 per cent more rearrests might be expected. If this were so, the basic recidivist rate would be increased from 11 to 14.3 per cent.[63]

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[56] Id. § 23-1331(3).

[57] National Bureau of Standards Study, supra note 21, at 136.

[58] Id. at 136-37.

[59] D.C. Crime Commission, supra note 40, at 355-56.

[60] National Bureau of Standards Study, supra note 21, at 79-80.

[61] Id. at 133.

Finally, as has already been indicated, there is a plethora of crimes that go unsolved and others that go unreported. Surely some of these crimes are committed by those on pretrial release, and, as the Study suggested, the unsolved offenses alone might raise the recidivist rate to nearly 37 per cent. How high it might reach if the unreported crimes, as well as those committed in other jurisdictions, could be included is a matter of conjecture.

It is submitted that the available statistics lead to two conclusions: first, that there is a significant problem of crime committed on bail; and second, that accurate statistics are impossible to obtain, causing figures that are produced to be underestimated, perhaps to a considerable extent. To defer legislation until the statistics question is answered is to avoid the problem entirely.

Whatever the exact rate of crime on bail may be, the rate of crime committed in the nation's capital has been soaring, especially since the enactment of the Bail Reform Act.[64] Reported burglaries in Washington rose from 10,267 in 1966, the year the Bail Reform Act went into effect, to 22,992 in 1969. Robberies rose from 3,703 in 1966 to 12,423 in 1969.[65] The Federal Bureau of Investigation reported a national rise in crime index offenses of 12 per cent in 1969 over that of 1968.[66] The rate of increase in Washington, however, was 26 per cent, or over twice the national rate.[67] In violent crimes the total number of reported offenses increased in Washington by more than 35 per cent, compared to 1968, while the national average rose by just 11 per cent.[68]

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[62] Id. at 6.

[63] Id. at 132.

[64] See chart published in H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 81 (1970).

[65] Id. at 16.

[66] Uniform Crime Reports, 1969, supra note 34, at 4.

[67] Federal Bureau of Investigation, Crime in the United States—Uniform Crime Reports, 1968, at 172 [Hereinafter cited as Uniform Crime Reports, 1968], listed 49,360 crime index offenses for Washington, D.C.; Uniform Crime Reports, 1969, supra note 34, at 170 listed 62,229 crime index offenses for Washington, D.C. Crime

No one, of course, can say how much of this increase is a result of crime on bail; but experienced observers, those who deal with crime on a day-to-day basis, believe it is one of the most significant factors. Jerry Wilson, the Chief of the Metropolitan Police Department in Washington, testified that crime-prone individuals who have demonstrated their reliability to appear in court are being released, and that they pose a danger to the safety of the community.[69] He also suggested that the number of persons who continually commit violent crimes, such as armed robbery, number no more than two to three hundred; and that if these individuals were held in pretrial detention when apprehended, it would have an effect far greater than the statistics indicate. He testified that when a person, known in his local community as a criminal, is arrested for a violent crime and is back on the street the next day, the effect on the youth of the community is serious.[70]

A number of local judges also have called for authority to detain defendants they deem dangerous. One judge commented on the criticism that courts lack the ability to assess the probability that crimes will be committed on pretrial release. In his view, such criticism overlooks the fact that under present law a judge setting bail must make the equally difficult prediction of the likelihood of flight. If a judge can make one estimate, he can make the other.[71] Another local judge stressed the necessity of balancing the right of a defendant charged with a serious crime to be free on bail pending trial, with the right of a law-abiding citizen to be protected against rape, robbery, or murder. In his view, limited pretrial detention is necessary, and the balance is in favor of the rights of society.[72] A third local judge stated that

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index offenses are criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, $50 and over in value, and auto theft. Violent crimes are criminal homicide, forcible rape, robbery and aggravated assault. The other crime index offenses are denoted as property crimes. Id. at 4.

[68] Uniform Crime Reports, 1969, supra note 34, at 4; Uniform Crime Reports 1968, supra note 67, at 172, listed 12,206 violent crimes for Washington, D.C.; Uniform Crime Reports 1969, supra note 34, at 170, listed 16,626 violent crimes for Washington, D.C.

[69] Hearings on Preventive Detention, supra note 16, at 238.

[70] Chief Wilson has also stated that the age of hold-up men has been dropping to as low as the early teens and added that in his view the reason was that a few dangerous individuals were being released in the community where the youngsters can see them. Hearings on Crime in the National Capital, Pt. 6, Preventive Detention, Before the Senate Committee on the District of Columbia, 91st Cong., 1st Sess. 1710-11 (1969).

[71] Hearings on Amendments to the Bail Reform Act, supra note 21, at 399 (Statement of Judge Belson).

[72] Hearings on Preventive Detention, supra note 16, at 332, 340 (Statement of Judge Hart).

the "[d]ocumented statistics of recidivism when coupled with a strong showing of present misconduct affords a judge sufficient criteria to enable him to predict with reasonable certainty whether an individual poses a danger to the community."[73] A fourth judge testified to his firm belief that an experienced trial judge can make a prediction of future crime "based upon adequate factual material relating to a defendant's past record and his current community situation."[74]

District of Columbia Grand Juries have repeatedly criticized the operation of the Bail Reform Act. In one letter on behalf of the Grand Jury, the foreman wrote that many times the Jury faced a defendant with a long record of violent crimes who was then under indictment and awaiting trial. He stated that he was appalled to learn that these defendants were often free on bail, thus afforded an opportunity to commit more crimes. In his view, their presence served as evidence to others that one could commit serious crimes in the District of Columbia, and still be free to walk the streets.[75] Moreover, four separate study groups, consisting of eminent and experienced members of the local bar, have studied the effect of the Bail Reform Act in the District of Columbia and have recommended enactment of pretrial detention.[76]

From a policy point of view, and in the context of a soaring crime rate, the legislative and executive branches of government must rely upon the advice of such experienced observers as the courts, the police, and highly qualified study groups. Absent reliable statistics, which appear impossible to obtain, these views become preeminent and, as a result, pretrial detention was proposed to Congress and enacted.

### C. *Bail Practices in Foreign Countries*

Another consideration in the decision to amend the Bail Reform Act is the experience of foreign countries. Erwin N. Griswold, Solicitor General of the United States, speaking recently of the current pretrial detention debate, suggested that "[m]ore consideration might well be given . . . to the methods followed in other countries, particularly in Great Britain, Canada and Australia where there is a high regard for civil liberties, as there is here.'"[77] An examination of the bail laws of those countries, as well as many of those in Western Europe, reveals that pretrial detention of dangerous defendants is the general practice.

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[73] Hearings on Amendments to the Bail Reform Act, supra note 21, at 220 (Statement of Judge Murphy).

[74] Id. at 91 (Statement of Judge Halleck).

[75] Letter to Attorney General Ramsey Clark from the Foreman of the September 1968 Grand Jury #1, Dec. 5, 1968, at 1.

[76] D.C. Crime Commission Report, supra note 40, at 527 (the Commission vote was 6-3); the Hart Committee 1969 Report, supra note 42, at 32 (the Committee vote was 6-5); Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, May 1970, at 41 (the Committee vote was 5-1); Report of the Advisory Panel Against Armed Violence, December 1969, at 19 (vote of this body was 12-1).

In Great Britain, the decision to grant or deny pretrial bail in all felony cases is largely discretionary with the court, and one of the prime considerations in making that decision is the likelihood of crime on bail.[78] This is true even though the British have an excessive bail clause in the Bill of Rights of 1688.[79] The justification for pretrial detention has largely been based on judicial decisions. A major case in point is a 1947 decision, concerning a housebreaker, decided by the Court of Criminal Appeals in *Rex v. Phillips*.[80] The court there stated:

> The Court feels very strongly that the appellant ought not to have been released on bail. In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail especially in the case of a man who has a record for housebreaking such as the applicant had .... Yet in spite of all his previous convictions the applicant was given bail, not once but twice, first pending the hearing before the magistrates and again on committal for trial. To turn such a man loose on society until he had received his punishment for an undoubted offense, an offense which was not in dispute was, in the view of the Court, a very inadvisable step. They wish magistrates who release on bail young housebreakers, such as this applicant, to know that in nineteen cases out of twenty it is a mistake. The Court hopes that some publicity will be given to these observations, so that magistrates may know the view of the Court of Criminal Appeal.[81]

Bail legislation was recently enacted in Great Britain as part of the Criminal Justice Act of 1967.[82] The intent of this Act was to answer criticism of unbridled judicial discretion in certain bail decisions.[83] The Act, however, covers only offenses which carry a maximum sentence of six months imprisonment, essentially misdemeanors, and thus does not affect any felony. While the 1967 Act stresses release on bail in misdemeanor cases, it also specifically states that even for these lesser offenses a magistrate is not required to release an accused on bail when, among other grounds, it appears probable that he will commit another offense if released,[84] has been imprisoned in the past,[85] or is already released on bail after an arrest.[86] Nothing in the D. C. Crime Bill would permit detention of a defendant charged with a misdemeanor (with one exception[87]) and detention is possible only in cases of specified felonies. The British, who share our passion for civil liberties, permit, and have always permitted, pretrial detention on a scale exceeding anything possible under the D. C. Crime bill.

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[77] Remarks of Solicitor General Erwin N. Griswold at the Centennial Celebration of the Department of Justice, July 1, 1970, at 7.

[78] Statement of Frank Milton, Chief Metropolitan Magistrate (London), Hearings on Crime in the National Capital before the Senate Committee on the District of Columbia, 91st Cong., 1st Sess. 1673, 1676.

[79] Bill of Rights, 1688, 1 W. & M., Sess. 2, c. 2.

[80] 32 Cr. App. R. 47 (1947).

[81] Id. at 48-49.

[82] Crim. Justice Act 1967 c. 80, Sess. 18.

[83] Supra note 78, at 1684.

In Canada the situation is quite similar. Under basic Canadian bail law, release of an accused is a matter of discretion for the court in all felonies.[88] While some courts in Canada continue to hold that the sole test for pretrial bail is the likelihood that the accused will appear for trial,[89] many Canadian courts apply the much broader test of danger of repeated criminal acts laid down by the English court in *Rex v. Phillips.*[90] A British Columbia court, in *Regina v. Wing,*[91] examined the *Phillips* holding that housebreaking is a crime likely to be repeated, and went on to state that if possession of drugs is substituted for housebreaking, the situation in *Wing* is identical to that in *Phillips.*[92] The suggestion was then made that *Phillips* should govern, particularly where the previous record discloses that the defendant is probably a drug addict and will commit other crimes if released. The court added that in granting bail judges should inquire into, and consider in more detail, the effect of setting a prisoner at large, and if the evidence indicates that other crimes may result, then bail should be refused. The court in *Wing* acknowledged that its statement on bail were dicta but added that because there were uncertainties as to the proper principles to apply, it was to be hoped that these statements would be adopted in the future to achieve greater uniformity.[93]

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[84] Crim. Justice Act 1967, supra note 82, at (5)(g).

[85] Id. at (5)(a).

[86] Id. at (5)(e).

[87] The exception is when the accused has threatened or intimidated a witness or juror. D.C. Crime Bill, supra note 1, § 23-1322(a)(3).

[88] Martin's Annual Criminal Code, § 463 (1969).

[89] Regina v. Samuelson, 109 Can. Crim. Cas. 253 (Newf. 1953).

[90] Supra note 80.

[91] 3 Can. Crim. Cas. 102 (B.C. 1964).

[92] Id. at 104.

[93] Id. The Phillips case has also been followed in the provinces of Saskatchewan and Quebec. Regina v. Lagus and Ziegler, 42 C.R. 288 (Sask. 1964); Regina v.

On June 8, 1970, Canadian Justice Minister, John Turner, introduced in the House of Commons a bill proposing major changes in the provisions of the law relating to arrest and the granting of bail. The legislation is intended to reform and humanize the administration of criminal law,[94] and is to have effect throughout Canada. Among the features of the bill proposed by the Government is the fixing of guidelines for admitting an accused to bail which is presently a matter of discretion. While generally encouraging pretrial release, the proposal sets forth two grounds that will justify pretrial detention: first, that the detention of the accused is necessary to ensure his attendance in court; or second, if the first ground cannot be used, that the detention of the accused is necessary in the public interest or for the protection or safety of the public. In this regard, the court is to consider, *inter alia*, whether there is any substantial likelihood that the accused will, if released, commit a criminal offense involving serious harm, or of an interference with the administration of justice.[95]

Thus pretrial detention will be possible throughout Canada under the proposed new law for protection of the public from future criminal offenses, and will cover all charges whether felonies or summary offenses (misdemeanors).[96] The proposal will require the court to review the case after 90 days of detention for a felony charge, and after 30 days on a summary offense charge. However, even after this period of time detention can be continued if the court finds it to be justified.[97] Parliament will consider the bill in the Fall of 1970 and its passage is considered likely by the end of that year.[98]

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McKinney, 40 C.R. 137 (Sask. 1963); Regina v. Travers and McGuire, 42 C.R. 32 (Que. 1964). It was, however, rejected in Alberta, Regina v. Henderson, 45 W.W.R. (n.s.) 55 [Can. 1963] and in Newfoundland, Regina v. Samuelson, supra note 89.

[94] N.Y. Times, June 14, 1970 sec. 1, p. 10, col. 1.

[95] Press release, Office of the Minister of Justice, June 8, 1970, at 14.

[96] Id. at 18-19.

[97] Id.

[98] Supra note 94. Much of the rest of the British Commonwealth follows the British and Canadian law. In the three major states of Australia bail is discretionary and danger to the community is a basic release test. In Queensland, bail is discretionary and can be denied when pretrial release is contrary to the public interest. In this context the Phillips case is cited. See Carter, Criminal Law of Queensland 481-83 (3d ed. 1969). In New South Wales, bail can be denied where there is a strong probability that the accused will either engage in the same type of offense for which he is charged, or any serious crime. Introduction to New South Wales Justices Act Ann. 133 (1966). In Victoria, the granting or denial of bail is discretionary for a person charged with any felony or misdemeanor. 60 Justices Act 1958 (Victoria) cited in Paul's Justices of the Peace 87 (1965). Bail in New Zealand is also discretionary and can be denied where there is a likelihood of the defendant continuing a criminal course of conduct or repeating an offense. Adams, Criminal Law and Practice in New Zealand 522 (1964). Pretrial detention to protect society is also practiced in India and Pakistan. See Husain, Law of Bails in India and Pakistan 65 (Pakistan Publishing House 1961).

Throughout Western Europe pretrial detention is widely practiced. France represents a particularly interesting example because bail law in that country is currently under revision. By statute in France, detention pending trial is said to be an "exceptional measure."[99] It is, however, permitted for any offense carrying a penalty of over two years imprisonment.[100] Among the accepted reasons for pretrial detention relied on in France is that it is a means of preventing the defendant from committing other offenses.[101] The practice of pretrial detention in France is apparently widespread and indiscriminate.[102] As a result, a movement is under way to revise existing bail laws and provide for more pretrial release.[103] The proposed bail reform law in France stresses the use of various release conditions analogous to those found in the Bail Reform Act,[104] and the increased use of money bond which has rarely been permitted in France.[105] Even under this reform measure pretrial detention can still be ordered when, *inter alia*, there is a finding that the accused's release will disturb public order or that the accused will either flee, obstruct justice, or commit another crime.[106] In sum, France, like Canada, although reforming its bail laws,[107] is permitting the continued use of pretrial detention to a degree impossible under the limited categories of the D. C. Crime Act.

In Italy, the principal issue in making the pretrial release decision is not whether the accused will return for trial, but whether the defendant, if released, will tamper with the witnesses or the evidence and whether he may commit other crimes while at liberty.[108] Pretrial detention is also practiced in West Germany, when there are definite facts to suspect that a person charged with a major crime will commit another major crime of the same type;[109] in Sweden, if there is cause to believe he will continue his criminal activity;[110] in the Netherlands, when public security requires immediate detention;[111] as well as in Norway;[112] Luxembourg;[113] and Turkey.[114]

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[99] The American Series of Foreign Penal Codes, No. 7, French Code of Crim. Proc., art. 137 (1964).

[100] Id. at art. 138.

[101] Vouin, Provisional Release in French Penal Law, 108 U. Pa. L. Rev. 355, 359 (1960).

[102] Craig and Dobrovir, Preventive Detention Breeds Injustice: The French Experience and Attempts at Reform (1970), printed in Hearings on Preventive Detention, supra note 16, at 1170-71.

[103] Id. at 1172.

[104] Id. at 1173.

[105] Id.

[106] Id.

[107] Passage of the new French bail law is expected soon.

[108] Botein and Sturz, Pretrial Release Practices in Sweden, Denmark, England and Italy, published in Proceedings and Interim Report of the National Conference on Bail and Criminal Justice 351 (1965).

[109] Mueller and Le Poole Griffeths, Comparative Criminal Procedure 107-08 (1969).

[110] The American Series of Foreign Penal Codes, No. 15, Swedish Code of Judicial

An examination of a number of Western European bail statutes, as well as others influenced by English legal traditions, reveals the use of pretrial detention in one form or another.[115] The major exception to this rule is the United States, where de facto pretrial detention exists through the manipulation of money bail.

## II. THE NEW BAIL LAW

The D.C. Crime Act provides for a number of changes in existing law aimed at a more effective implementation of the Bail Reform Act and the deterrence of crime on bail. The changes include provisions for an expanded bail agency,[116] the

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Proc. 102 (1968). Pretrial release and detention practices in Denmark have been reported to be almost precisely the same as those in Sweden. Botein and Sturz, supra note 108, at 332.

[111] Supra note 109, at 109.

[112] Bratholm, Arrest and Detention in Norway, 108 U. Pa. L. Rev. 336, 337-38 (1960).

[113] Department of the Army, Luxembourg Law and the NATO Status of Forces Agreement, Judge Advocate Division, 76-77 (1955).

[114] The American Series of Foreign Penal Codes, No. 5, Turkish Crim. Proc. Code at §§ 104, 117, 200 (1962).

[115] The present bail laws of Japan represent another interesting comparison because its constitution and statutes were greatly swayed by American influence in the immediate post-war occupation era. In 1948, during the occupation, a code of criminal procedure was promulgated that permitted the denial of bail when the crime charged carried a penalty of death or an indeterminate period of imprisonment, when the accused had a prior conviction of an offense carrying at least a ten-year term, or when the accused had habitually committed an offense carrying three years imprisonment. See Codes and Statutes of Japan, No. 1. Code of Crim. Proc., Law No. 131, July 10, 1948, art. 89. By 1965 these grounds had been expanded to cover cases where there is reason to suspect that the defendant may inflict injury on the person or property of the complainant or a witness. Dando, Japanese Law of Criminal Procedure 265 (1965).

[116] D.C. Crime Act, supra note 1, §§ 23-1301-08. The present Bail Agency was created by Congress (District of Columbia Bail Agency Act, P.L. 89-59, approved July 26, 1966, D.C. Code T. 23 § 901, 80 Stat. 327) shortly after passage of the Bail Reform Act. The Agency was intended to serve as an information gathering body to interview defendants prior to their initial appearance for a bail determination and to verify the information provided primarily as to community contacts, jobs and the like. It was also permitted to recommend release on personal recognizance, personal bond and other nonfinancial release conditions, but was directed to make no other recommendation. In practice, the Bail Agency proved ineffective. Plagued constantly by a shortage of personnel and funds, it rarely did more than interview defendants just prior to their first court appearance and then make a few telephone calls in an often fruitless effort to verify information. The new Act vastly increases the role of the Bail Agency both by increasing its functions and duties and by eliminating an unrealistic budget ceiling. Among its new duties is the responsibility for finding and coordinating organizations and persons willing to serve as third party custodians for released defendants; for checking on the performance of court ordered release conditions; for notifying defendants of scheduled court appearances; to assist released persons in obtaining employment training, medical services, and the like; as well as serving as a central information center for all defendants released

use of community danger as a test for setting nonfinancial release conditions,[117] and authority for the imposition of an added penalty for crimes committed on bail.[118] However, none of these changes in the law[119] really reaches the problem posed by the dangerous defendant. It is to this problem that the controversial pretrial detention section addresses itself.

The Act contemplates the initial presentation of all defendants before the judicial officer in the same manner as practiced since the enactment of the Bail Reform Act. At this first hearing the vast majority of defendants will have conditions for their release determined. If, however, after a motion by the United States Attorney for a detention hearing, the judicial officer reaches a threshold conclusion that, on the state of the facts as then revealed, no condition or combination of conditions of release will assure community safety, he then has discretion to order a pretrial detention hearing. This is true, however, only if the defendant fits within one of the detention categories set

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pending appearance in criminal proceedings. In addition, it will be able to make recommendations to the court for release conditions covering the full range of conditions in the Bail Reform Act and will be expected to notify the court of any violations.

[117] D.C. Crime Act, supra note 1, § 23-1321(a). The Bail Reform Act, with its rigid risk of flight release test, permits the court to order restrictions on a person's travel and associations if there is a risk of flight, but forbids it to restrict the activities of an apparently dangerous offender in a similar manner. Since loss of the freedom does not result, there seems little objection to granting such authority to courts. It should be noted that, under this section, danger to the community cannot be considered in setting financial release conditions.

[118] D.C. Crime Act, supra note 1, § 23-1328. The added penalty is to be imposed consecutively. All too often, the prospects of clogged calendars and the practice of not trying a defendant who is convicted of one offense for others that are pending, gives some defendants, who are quite familiar with the problems and practices of the courts, what amounts to a free ride for any crimes they might commit on bail. The prospect of an added penalty, to be served consecutively with any other penalty imposed, could act to deter crimes committed on bail.

[119] Other changes effected by the Act include the imposition of sanctions for the violation of release conditions. D.C. Crime Act, supra note 1, § 23-1329. A major criticism of the Bail Reform Act is that it has no real sanction for violation of any release condition short of failure to appear, although two recent federal cases have held that forfeiture of money bond is an available sanction for violation of release conditions. Brown v. United States, 410 F.2d 212 (5th Cir. 1969); United States ex rel. Brown v. Fogel, 395 F.2d 291 (4th Cir. 1968). While the Act stated that nothing therein was intended to interfere with or prevent any court from exercising its contempt powers [18 U.S.C. § 3151 (Supp. IV, 1969)], contempt of court for violations of release conditions is rarely used. To put some teeth into the requirement that release conditions be obeyed, the new Act establishes a two-fold sanction. First, to encourage use of the contempt power, the Act specifically sets out a contempt statute permitting up to a six-month sentence for intentional violation of release conditions. As a further sanction, the Act authorizes revocation of release when there is clear and convincing evidence that the defendant has violated a condition of his release and the judicial officer concludes that no condition or combination of conditions of release will reasonably assure that the defendant will not flee or pose a danger to another person or to the community.

forth in the statute.[120] Initially, then three preconditions to the holding of a detention hearing exist: first, the United States Attorney must initiate the proceeding by motion, placing the responsibility for initial action in the office most likely to have the pertinent information; second, the judicial officer must examine the range of release conditions, short of detention, open to him and make a preliminary decision that none of them (excluding financial conditions) will assure community safety and then grant the motion; and third, the defendant must fall within one of four detention categories.

The categories themselves are simply triggering mechanisms. The fact that a defendant falls within one of them does not mean that pretrial detention will result, or that the United States Attorney will move for a detention hearing, or that the court will grant the motion if made. The first two categories are labeled with specifically defined words of art: "dangerous crime" and "crime of violence." A dangerous crime is defined to include the felonies of robbery, burglary, arson, forcible rape and unlawful sale or distribution of drugs.[121] Considered the most serious offenses, these are the ones that carry the greatest risk of recidivism.[122] To the extent that any statistical study has validity, the studies conducted on robbery and armed robbery, and the National Bureau of Standards' finding that those charged with dangerous crimes are three to four times as likely to be rearrested, support this conclusion.[123] Drug sales or distribution (not possession) were included, despite the fact that those crimes are nonviolent, because of the connection between narcotic sales and violent crimes committed to support a drug habit.[124] In the dangerous crime category the mere charge is deemed sufficient to make the defendant a candidate for a detention hearing. For this reason the individual crimes were restrictively defined; thus rape is defined as "forcible" to eliminate statutory rape, and robbery must have the attendant use or threat of force to eliminate pickpocketing.[125]

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[120] D.C. Crime Act, supra note 1, § 23-1321.

[121] Id. § 23-1331(3).

[122] See Department of Justice, Explanatory Statement on Proposed Bail Reform Act Amendments, printed in 115 Cong. Rec. 5892 (daily ed. July 14, 1969).

[123] Supra note 58. In addition to the charge of a dangerous crime, as defined, another prerequisite to holding a detention hearing, for this category, is that the Government must certify, by motion based on the defendant's "pattern of behavior consisting of his past and present conduct," as well as the other factors normally considered, that there is no condition or combination of conditions which will reasonably assure community safety. D.C. Crime Act, supra note 1, § 23-1322(a)(1). Because the dangerous crime category, unlike the others, is not directly tied to past conduct, the above quoted language was apparently added by Congress to avoid the possibility of pretrial detention of a person without any history of criminal involvement solely because he is charged with a dangerous crime.

[124] See D.C. Crime Commission Report, supra note 40, at 564-65; Hearings on Amendments to the Bail Reform Act, supra note 21, at 121-22 (Statement of Judge Halleck). It is intended that marijuana be excluded. See section by section analysis submitted by Cong. McMillan, 116 Cong. Rec. 2076, 2080 (daily ed. March 19, 1970).

The second category, crimes of violence, emphasizes the past conduct of the defendant and his prior involvement in violent offenses. The mere charge of a crime of violence, defined to embrace the full range of violent offenses, all of which must be felonies,[126] is insufficient to bring about a hearing. A defendant charged with a crime of violence will be within this category only if: (1) he is currently on pretrial release or release pending appeal, charged with a prior crime of violence; or (2) he has been convicted in the past ten years of a crime of violence; or (3) he is then on parole or probation for a crime of violence.[127] This category looks to past conduct and stresses either the fact that the defendant has been trusted once with pretrial release, or has a record of conviction for a crime of violence leading the court to believe he will commit another such crime.

The third category covers a narcotic addict charged with one of the enumerated crimes of violence.[128] It is probable that no more predictable person exists than the addict driven to crime by his "habit." The Act carefully limits the application of this category to those addicts charged, not with the usual property crimes such as larceny, but to addicts who have graduated to potentially dangerous crimes such as armed robbery.

The final category covers those defendants who, irrespective of the offense charged, obstruct justice by threatening witnesses or jurors.[129] Present law permits this form of pretrial detention. In *Carbo v. United States*,[130] Justice Douglas denied bail pending appeal because threats to witnesses had been made and the pending appeal could have resulted in a new trial. Moreover, it is clear that a trial court has the inherent power to revoke a defendant's bail during trial in order to insure proper and orderly trial procedures.[131] This doctrine was recently extended, in the District of Columbia, in *United States v. Gilbert*[132] to pretrial situations. It was there held that "courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial."[133] This power, however, must be exercised with great care, and "only after a hearing which affords the defendant an ample opportunity to refute the charges that if released he might threaten or cause to be threatened a potential witness or otherwise unlawfully interfere with the criminal prosecution."[134]

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[125] Supra note 122.

[126] D.C. Crime Act, supra note 1, § 23-1331(4). The offenses listed therein are murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper or indecent liberties with a child under the age of sixteen, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses.

[127] Id. § 23-1322(a)(2).

[128] Id. § 23-1323.

[129] Id. § 23-1322(a)(3).

[130] 82 S. Ct. 662 (Douglas, Cir. Justice, 1962).

[131] Fernandez v. United States, 81 S. Ct. 642 (Harlan, Cir. Justice, 1961); Carbo v. United States, 288 F.2d 686 (9th Cir. 1961); United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961).

It is exactly the type of hearing, referred to in *Gilbert*, that the D. C. Crime Act affords to all defendants subject to pretrial detention. The Act requires that defendants falling within the detention categories must be granted an adversary hearing prior to the issuance of any detention order.[135] At this hearing the judicial officer makes two basic findings: first, that there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or of the community;[136] and second, that there is a substantial probability that the person committed the present offense.[137]

The language of the first finding is parallel to the finding required to detain a defendant under the present Bail Reform Act in capital cases and in cases of bond pending appeal.[138] The consideration of danger as a release test is, thus, not unique. In fact, in testimony when the Bail Reform Act was under consideration, the then Deputy Attorney General, Ramsey Clark, stated that the use of this statutory language "would for the first time codify the recognition courts have already given in capital and appeal cases, that it is proper to consider whether the defendant is a potential threat to community safety.'"[139] This legislative language has been the subject of judicial interpretation in the last four years. In one capital case a lower court's denial of bail on the ground of danger was reversed because the alleged crime was apparently committed in defense of the appellant's husband, thus not connoting a risk of danger to the community, and because the appellant had no criminal record. In such a case, the court stated, the government must come forward with some other factor to suggest dangerousness.[140] In another case, the appellate court approved a denial of bond pending appeal on the ground of community danger where the lower court found the appellant had robbed a juvenile on the street just 22 days after being released on probation subsequent to a conviction for carrying a dangerous weapon.[141] In accord with other interpretations of the similar language incorporated in the Bail Reform Act, it is contemplated that the order of detention will only issue after the judicial officer has given full consideration to other release conditions, and has concluded that their imposition on the defendant will not reasonably assure the safety of any other person or the community.[142]

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[132] 425 F.2d 490 (D.C. Cir. 1969).

[133] Id. at 492. Although the cases talk only of witnesses, it seems perfectly proper to include threats to jurors as well as those to witnesses.

[134] United States v. Gilbert, supra note 132, at 492.

[135] D.C. Crime Act, supra note 1, § 23-1322(b).

[136] Id. § 23-1322(b)(2)(B).

[137] Id. § 23-1322(b)(2)(C). A third finding is also required—that there is clear and convincing evidence that the defendant fits within a detention category. Id. § 23-1322(b)(2)(A). As to the dangerous crime or violent crime category, the court merely must find that the pending charge correctly fits within the category to satisfy this requirement. As to the threatening witnesses category, the required finding is more fundamental and goes to the question of whether or not the threat was actually made. As to a narcotic addict charged with a crime of violence, the finding will go to the issue of actual addiction. Id. § 23-1323(c)(2)(A).

[138] 18 U.S.C. § 3148 (Supp. IV, 1969). While the wording used as the test for pretrial detention in § 23-1322(b)(2)(B) is identical to that found in the Bail Reform Act, it should be noted that the latter language applied only to cases of bail pending appeal and capital cases. Under the D.C. Crime Act, bail pending appeal has been made far more restrictive and can be denied, inter alia, because of danger to the property of others. D.C. Crime Act, supra note 1, § 23-1325(c). Moreover, as to capital cases, the House Report indicates that in cases of felony murder, detention is expected to result routinely. H.R. Rep. 91-907, supra note 64, at 185. Thus, the cases prior to the D.C. Crime Act that analyze the now changed provisions as to bail pending appeal and capital cases, while interpreting identical language, may not have full precedental value.

Clearly the concept of danger to the community is one that is still under interpretation. One question that will undoubtedly arise is whether such danger is from the threat of future violent crimes or of property crimes. All the triggering categories contemplate violent crimes involving personal danger except for drug sales and that particular crime often sets the stage for other and more violent offenses. One judicial interpretation of the Bail Reform Act indicates that danger to the community means physical danger rather than property danger.[143] However, testimony by a Department of Justice representative indicates that the concept may be open to a broader interpretation.[144]

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[139] Hearings on Federal Bail Procedures Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 1st Sess., 26 (1965).

[140] White v. United States, 412 F.2d 145 (D.C. Cir. 1968).

[141] United States v. Long, 422 F.2d 712 (D.C. Cir. 1970). Long is a particularly strong case for detention because the defendant also had a criminal record for violent crimes, had lied to a probation officer, and had threatened a government witness.

Danger has also been held not to encompass mere advocacy of the use of illegal drugs or other law violations. To avoid First Amendment problems, the term "danger" in a bail pending appeal case was construed to mean conduct, not advocacy falling short of actual incitement to imminent unlawful conduct. Leary v. United States, — F.2d — (5th Cir. 1970).

[142] United States v. Seeger, — F.2d — (D.C. Cir. 1970); Weaver v. United States, 405 F.2d 353 (D.C. Cir. 1968). Financial provisions may not be considered in determining release conditions when danger to the community is used as a release test. D.C. Crime Act, supra note 1, § 23-1321(a).

[143] United States v. Forrest, 418 F.2d 1186 (D.C. Cir. 1969). For a contrary view on whether the public is entitled to be protected from the danger of property offenses, see the dissenting opinion of Judge Robb in Forrest.

The second finding, that of substantial probability that the person committed the offense,[145] is indeed unique. This, as the House Report stated, is intended to minimize as far as possible the chance of detaining prior to trial, even on probable cause, defendants who are innocent or who, from the state of the evidence, are unlikely to be convicted.[146] It should also act as a deterrent to the prosecutor who exaggerates the case against the defendant in order to fit him into a detention category. The standard of "substantial probability" is new to the criminal law and will require judicial interpretation. It is obviously a higher standard than probable cause; just as obviously, it is not as high a standard as guilt beyond a reasonable doubt, which would require a trial on the ultimate issue.[147] As a standard, it is intended to be similar to the civil test for the issuance of a preliminary injunction, frequently characterized as the "likelihood of eventual success on the merits."[148] It has also been suggested that a finding of probable guilt of a violent crime is the best possible evidence of future dangerousness because nothing indicates future criminal acts more clearly than the commission of a crime in the immediate past.[149]

The finding of substantial probability is to be predicated on the information presented at the hearing by "proffer or otherwise,"[150] and thus, there is no absolute necessity for sworn testimony. This is in keeping with present bail hearing practices where release conditions, including money bail, are determined upon information proffered by the prosecutor, the defense counsel and the bail agency. It is clear, however, that the court may require a witness to testify, but this is not intended to be the general practice.[151]

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[144] Hearings on Preventive Detention, supra note 16, at 312-13 (Statement of Associate Deputy Attorney General Santarelli).

[145] This finding is required for all detention categories, except when the hearing is predicated on threats or intimidation of witnesses or jurors. This exception is made because existing law permits detention in such cases without this type of finding. See cases cited in notes 130-32, supra.

The phrase "committed the offense" means ultimate conviction. See Statement of Attorney General Mitchell, supra note 10, at 12. This is not intended to mean that such issues as the possible suppression of evidence are to be considered and decided at the detention hearing. It means simply that there is a substantial probability of conviction based on the evidence as proffered at the hearing. If at a later time evidence is ruled inadmissible, and a substantial probability of conviction then no longer exists, a remedy is afforded to the defendant to be considered for release conditions on the basis of a subsequent event that has eliminated the basis for detention. See D.C. Crime Act § 23-1322(d)(2)(B).

[146] H.R. Rep. 91-907, supra note 64, at 182.

[147] It has been charged that requiring a finding such as this amounts to a violation of the stricture against double jeopardy. See Hearings on Preventive Detention, supra note 16, at 7 (Statement of Sen. Ervin). It is submitted that this finding, in the preliminary pretrial setting of a detention hearing, is no more a violation of double jeopardy than is the finding of probable cause by a committing magistrate or an indictment by a Grand Jury.

[148] W.E. Bassett Co. v. Revlon, Inc., 354 F.2d 868, 872 (2d Cir. 1966).

[149] Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, supra note 17, at 1239.

[150] D.C. Crime Act, supra note 1, § 23-1322(b)(2)(C).

If the judicial officer decides to issue a detention order, he is required to submit written findings of fact and the reasons for its issuance.[152] This requirement is in stark contrast to existing law under the Bail Reform Act, where a court may set money bond that incarcerates a defendant without any requirement for written reasons until at least 24 hours have passed, and then only if the defendant specifically moves for reconsideration of the release conditions.[153] This so-called "24-hour review" is infrequently utilized by defense attorneys, with the result that written reasons rarely appear.[154]

The Act contemplates a wide variety of procedural safeguards for the defendant at the hearing and during any period of detention, many of which are not available under the Bail Reform Act even though imposition of money bond often results in pretrial detention. The more fundamental rights are specifically afforded to the defendant by the Act, such as the right to be represented by counsel, to testify, to present information and witnesses in his own behalf and to appeal,[155] and in the event the defendant takes the stand, his testimony will not be admissible on the issue of guilt in any other proceeding.[156]

One of the most significant features of the Act is the requirement that a person detained be placed on an expedited calendar, and that pretrial detention cannot last longer than 60 days unless the trial is in progress or the defendant is delaying the trial, other than by the filing of timely motions.[157] If at the end of 60 days the trial has not begun and delay cannot be laid at the defendant's door, he must be granted release conditions.[158] It has been charged that this is a mere sham and that the courts will continue to use high money bond to detain dangerous defendants.[159] This is a possibility, because legislation cannot require a court to avoid hypocrisy. However, the use of money bail in such cases will be far more visible, and it is anticipated that the appellate courts and the defense bar will take an active role in ending such hypocrisy. This can be expected to occur because the basic reason for high money bail—that there is no other way to detain a dangerous offender—will be eliminated, and the fault will not be with the bail system but with the judicial system's inability to act with dispatch. Moreover, the requirement of a trial within 60 days should limit the use of pretrial detention only to those defendants who pose the most obvious risks of danger. Indiscriminate use of detention will flounder on the 60 day trial requirement.

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[151] H.R. Rep. No. 91-907, supra note 64, at 182-83.

[152] D.C. Crime Act, supra note 1, § 23-1322(b)(3).

[153] 18 U.S.C. § 3146(d) (Supp. IV, 1969).

[154] See Hart Committee 1968 Report, supra note 43, at 13.

[155] D.C. Crime Act, supra note 1, § 23-1322(c)(4), (7).

[156] Id. § 23-1322(c)(6). It will, however, be admissible in bail jumping prosecutions (§ 23-1327), to determine if a crime has been committed on bail for an added penalty (§ 23-1328), in proceedings to revoke bail and for contempt of court for violation of release conditions (§ 23-1329) and in perjury prosecutions and for purposes of impeachment. It has been suggested that using testimony given at a detention hearing for impeachment may violate the recent decision in Simmons v. United States, 390 U.S. 377 (1968). See Hearings on Preventive Detention, supra note 16, at 508 (Statement of Prof. Wright). Use of such statements for impeachment, however, is supported by case law in the District of Columbia in analogous situations. See Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967); Woody v. United States, 379 F.2d 130 (D.C. Cir. 1967). A more direct conflict with Simmons may arise if a defendant's testimony at a detention hearing is later used as direct evidence in a bail jumping prosecution.

[157] D.C. Crime Act, supra note 1, § 23-1322(d).

Two other benefits have been made available under the Act to defendants held in pretrial detention and to any defendant held before trial, or pending appeal, whether on money bond or in a capital case. First, these defendants are to be confined, to the extent feasible, in facilities separate from convicted defendants.[160] Second, persons detained are to have reasonable opportunity to consult with counsel, and can be released for limited periods of time to assist in the preparation of their defense, or to search for witnesses while in the custody of a United States marshal, or other appropriate person such as their attorney.[161] This concept of release to help in the preparation of the defense is a major innovation benefiting all those held in custody pending trial.

## III. THE CONSTITUTIONAL ISSUES

Pretrial detention in noncapital cases has always been subjected to vigorous attack on constitutional grounds. Now that Congress has acted in favor of the concept, the legislation can be expected to be challenged in the federal courts at the earliest possible moment,[162] with the constitutional issue receiving final resolution by the Supreme Court.

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[158] It is clear that no extension of the period of pretrial detention is contemplated. See Hearings on Preventive Detention, supra note 16, at 317-19 (Statement of Associate Deputy Attorney General Santarelli).

[159] Hearings on Preventive Detention, supra note 16, at 10 (Statement of Sen. Ervin).

[160] D.C. Crime Act, supra note 1, § 23-1321(h)(1). This conforms to existing District of Columbia practice but is not made an absolute requirement because there are situations, usually of an emergency nature, where strict separation in different facilities is impossible. H.R. Rep. No. 91-907, supra note 64, at 180.

[161] D.C. Crime Act, supra note 1, § 23-1321(h)(2).

Constitutional attacks generally rest on two grounds. First, that pretrial detention violates the eighth amendment proscription against excessive bail. Second, that it contravenes the fifth amendment due process clause. Both of these are serious issues, which, in this author's view, can be resolved in favor of the pretrial detention system enacted by Congress.[163]

## A. *The Eighth Amendment*

The clearest thing that can be said about the bail provision of the eighth amendment is that it is cryptic. It merely says that: "Excessive bail shall not be required."[164] This sparse language is open to a number of different interpretations. One is that if bail may not be set at an excessive amount then, a total denial of bail is also impermissible because nothing could be more excessive than complete denial. In essence, this interpretation reads an absolute right to pretrial bail into the eighth amendment. The problem with this interpretation is that there is manifestly no absolute right to pretrial bail because bail has been traditionally denied in all pretrial capital cases,[165] and has been held deniable in cases of threats to witnesses.[166]

absolute
rt. to bail?

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[162] The pretrial detention section is tied to the initial phase of a court reorganization and is effective on February 1, 1971. D.C. Crime Act, supra note 1, Title IX, § 901(a).

[163] It is also argued that pretrial detention violates the presumption of innocence. That presumption, however, is merely a rule of evidence that attaches to a defendant at the beginning of a trial and remains with him throughout the trial. Brubaker v. United States, 183 F.2d 894 (6th Cir. 1950). There is no presumption of innocence during pretrial procedures. National Conference on Bail and Criminal Justice, supra note 4, at 177. If such a pretrial presumption of innocence existed as a bar to detention of the dangerous before trial, it would also bar pretrial detention of those charged with capital offenses, those held on money bond and could even be extended to prevent police from arresting persons and taking them into custody on probable cause. Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, supra note 17, at 1231-32. Stack v. Boyle, 342 U.S. 1 (1951), is the only case in which the Supreme Court gave any indication that the presumption of innocence might be applicable in any stage other than at trial. The statement in that case was dictum and related to statutory considerations. (See text at notes 199-200, infra). While no Supreme Court case is directly in point, many have dealt with the presumption of innocence in relation to the trial. Quinn v. United States, 349 U.S. 155, 162 (1955); Yee Hem v. United States, 268 U.S. 178, 184 (1925); Kirby v. United States, 174 U.S. 47, 55 (1899); Allen v. United States, 164 U.S. 492, 500 (1896); Coffin v. United States, 156 U.S. 432, 458-59 (1895); Lilienthal's Tobacco v. United States, 97 U.S. 237, 266 (1877). A reference in passing to the presumption of innocence in connection with a determination of probable cause for an arrest was made in United States v. Di Re, 332 U.S. 581, 595 (1948). See also Washington v. Clemmer, 339 F.2d 725, 729 (D.C. Cir. 1964) (presumption of innocence has meaning at a preliminary hearing).

Presumed
Innocence

[164] U.S. Const. Amend. VIII.

[165] See Judiciary Act of 1789, supra note 3; 18 U.S.C. § 3148 (Supp. IV, 1969).

[166] United States v. Gilbert, supra note 132.

A second interpretation is that the eighth amendment merely forbids excessive bail only in cases where bail is otherwise proper. Under this view, there is no absolute right to bail, and Congress may properly define those classes of cases where bail may be allowed and those where it may be denied outright. The major criticism of this view was set forth by Justice Black in a dissent stating that this interpretation means that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away. The Amendment is thus reduced below the level of a pious admonition."[167]

Despite Justice Black's criticism, this latter view, that the right to bail is not absolute, is the one supported by historical antecedents of the eighth amendment, the existing practice at the time of the amendment's adoption, and by case law. Justice Black's objection can be met by the realization that, just as there is no absolute right to bail, as for example in capital cases, there is, in addition, no absolute right vested in Congress to arbitrarily deny bail in any and all cases. Instead, Congress has the right to deny pretrial bail only in those cases where it is reasonable and otherwise proper to do so, and where the denial can be supported rationally, and is not arbitrary.[168] The first Congress denied bail in pretrial capital cases because it was feared that persons with their lives in danger would flee if given the opportunity, and, quite possibly, because capital crimes were generally regarded as the most heinous and bore the greatest risk of danger to the community. Congress, according to this theory, can also deny pretrial bail to a carefully selected group of offenders who pose a serious risk to the safety of society if released.

The historical antecedents of bail are murky and involved, and are, in the main, beyond the scope of this article.[169] However, some observations about them are indicative of the view that the eighth amendment does not guarantee an absolute right to bail. It has been said that the history of bail as it existed in 1789 rested on three basic propositions. First, that over the years a series of statutes had determined those instances in which bail could be allowed or denied—each a hard-won victory over the crown's power to detain. Second, that the right to habeas corpus guaranteed a procedural remedy to prevent the denial of bail in those cases where the statutes permitted it. Third, that the proscription of excessive bail was included in the English Bill of Rights of 1688[170] to deter the King and the courts from doing indirectly what the statutes permitting bail forbade them to do directly.[171] Both habeas corpus and the ban on excessive bail are included in the American Constitution.[172] The third element, the right to bail, has been argued to have been unaccountably left out of the constitutional equation and its absence is attributed to inadvertence and historical accident.[173] However, it is submitted that a contrary view is more tenable, and that the omission of a right to bail from the Constitution was deliberate. This right, as it developed, was purely statutory. This is the teaching of the development of English bail history, and it should be noted that, in England, pretrial bail has always been discretionary and remains so today, except for misdemeanors.[174] By including in the Constitution the right to habeas corpus and the ban on excessive bail, the framers were assuring that when a statute granted a right to bail, that right would be preserved and not subverted. There is little evidence that an absolute right to pretrial bail was also intended.

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[167] Carlson v. Landon, 342 U.S. 524, 556 (1952) (Black, J., dissenting).

[168] See Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir.), cert. denied, 376 U.S. 965 (1964).

[169] These historical antecedents are set forth in detail in Foote, The Coming Constitutional Crisis in Bail, 113 U. Pa. L. Rev. 959, 965-79 (1965). See also The Case of the Dangerous Defendant: A Study and Proposal, Report of the Administrative Board of the Judicial Conference of the State of New York, for the Judicial Year July 1, 1967 through June 30, 1968 122, 133-48 [Hereinafter cited as New York Judicial Council Report].

Two factors indicate that the drafters of the eighth amendment did not intend to create an absolute right to bail. First, had they wished to do so, they certainly could have been expected to act explicitly. The Congress had before it the precedent of the Northwest Ordinance, adopted by the Continental Congress in 1787,[175] and various colonial statutes[176] that specifically granted a right to bail in all pretrial noncapital cases. Not only is there no reference to a right to bail in the eighth amendment, there is almost no discussion of the issue in the congressional debate over the Bill of Rights.[177] Nearly forty states have specifically and intentionally included that right in their constitutions[178] in addition to excessive bail clauses. If an excessive bail clause alone implicitly creates a right to pretrial bail, it is difficult to understand why so many states thought it necessary to include both rights. The history of constitutional drafting throughout the United States indicates that when a right to bail is intended, it is set forth in clear and unambiguous language.

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[170] Supra note 79.

[171] Foote, The Coming Constitutional Crisis in Bail, supra note 169, at 968.

[172] The right of habeas corpus is set forth in U.S. Const. art. I § 9(2).

[173] Foote, The Coming Constitutional Crisis in Bail, supra note 169, at 968, 986.

[174] See, e.g., Criminal Law Act 1826, 7 Geo. 4 c. 64 § 2-3; Indictable Offenses Act of 1848, 11 & 12 Vict. c. 42 § 23; Criminal Justice Act of 1967, supra note 82.

[175] An ordinance for the government of the territory of the United States Northwest of the River Ohio, July 13, 1787, art. II.

[176] See N.C. Const. Declarations of Rights, § 10 (Dec. 18, 1776) cited in Foote, The Coming Constitutional Crisis in Bail, supra note 169, at 969 n. 47; Pennsylvania Constitution of 1776, § 28 cited in Purdon's Pa. Stat., art. 1 § 14 Const. (1969) (Historical note).

[177] Prof. Foote discovered but one reference to the bail clause in the Congressional debates and that was an unanswered question as to what the language meant. Foote, The Coming Constitutional Crisis in Bail, supra note 169, at 986.

[178] For a list of these constitutional provisions see Bail in the United States, supra note 4, at 2-3.

Second, the very same Congress that passed the eighth amendment enacted the Judiciary Act of 1789,[179] which created a statutory right to pretrial bail in noncapital cases similar to that found in colonial statutes while denying bail in capital cases. It is illogical to argue that Congress would adopt a constitutional amendment granting an absolute right to bail within days of passing a statute that withholds that right in a specific class of cases. If the eighth amendment is read as granting an absolute right to bail, every federal bail statute since 1789 which authorizes the denial of bail in capital cases is unconstitutional, and the constitutional and statutory enactments of virtually every state in the union appear likewise unconstitutional when they carve out capital case exceptions.[180] It is more plausible that the eighth amendment was not intended to create any right to bail, but, rather, was intended to protect against the arbitrary use of money bail to deny release in those areas where Congress granted the right by statute.

If one accepts the view that the Constitution permits the denial of bail in certain cases, the next problem is to determine the permissible grounds for denial. Opponents of pretrial detention argue that risk of flight is the only historical ground for the granting of bail, and justify the capital case exception on the ground that danger of flight is so great when life is at stake that it warrants pretrial detention in such cases. It has been suggested recently, however, that another reason existed in 1789 for denial of bail in pretrial cases—danger to the community.[181] When one looks at the wide range of capital cases in 1789,[182] where bail could be denied, it is noteworthy that many of the cases were those where the crime was highly dangerous,[183] and where the D. C. Crime Act contemplates detention today—rape, arson, burglary, robbery, and the like. As time has passed, the use of the death penalty has declined, but the reasons for this decline—doubts about the efficacy of the death penalty as a deterrent, and the increasing possibility of rehabilitation—have no relation to the possibility that a defendant charged with a crime like rape or robbery may pose a danger to society if released. Thus, ending capital punishment has little to do with granting or denying pretrial release for dangerous crimes.

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[179] Supra note 3.

[180] Although there is no direct Supreme Court holding in point, it seems clear that the excessive bail clause of the eighth amendment applies to the states through the due process clause of the fourteenth amendment. Mastrian v. Hedman, supra note 168; Pilkinton v. Circuit Court of Howell County, Missouri, 324 F.2d 45 (8th Cir. 1963). The cruel and unusual punishment clause of the eighth amendment has been held applicable to the states by the Supreme Court. Robinson v. California, 370 U.S. 660 (1962).

[181] See Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, supra note 17, at 1225.

[182] An extensive list of these statutes is set forth in Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, supra note 17, at 1227-29 n. 22.

[183] Id.

If the sole reason for the denial of bail in capital cases is the high risk of flight, it should follow that as capital offenses decline, and as the death penalty is abolished, the right to pretrial bail should be extended to cover the former capital cases. Yet, an examination of the laws of those states where capital punishment has either been totally or partially abolished reveals a contrary trend. Maine, for instance, abolished capital punishment in 1887.[184] However, the present Maine Constitution, adopted in 1819, some 68 years before abolition, states:

> No person before conviction shall be bailable for any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be.[185]

In an early compilation of Maine laws, capital offenses included treason, murder, rape, arson and burglary.[186] Any person today charged with one of these offenses may, under existing Maine law, be held without bail. It would seem that the drafters of the Maine constitution in 1819 were worried about something more than flight when they considered the relationship between capital cases and bail. A more recent example of the same trend occurred in Iowa. In 1965, the legislature abolished capital punishment by reducing the punishment for murder in the first degree and kidnapping for ransom, from death to life imprisonment.[187] At the same time the legislature amended the bail statute, which had provided for bail in all but capital cases,[188] so that bail is now deniable in both of the cases where capital punishment formerly existed.[189]

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[184] Executions, 1930-1967, National Prisoner Statistics, Bulletin No. 42 Bureau of Prisons, United States Department of Justice 32 (1968). Capital punishment has been abolished in full or in part in thirteen states: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, Vermont, West Virginia and Wisconsin. Id.

[185] Maine Const. art. 1 § 10. Bail is covered in Maine by court rule and the applicable rule permits bail to be granted in all cases "in accordance with the constitution and statutes of this state." Rule 46(a) Maine R. Crim. Proc.

[186] L. 1822, ch. I-IV; VI.

[187] Iowa Code Ann. §§ 690.2, 706.3 (Supp. 1970).

[188] Iowa Code Ann. § 763.1 (1949).

[189] Iowa Code Ann. § 763.1 (Supp. 1970). The Iowa Constitution provides for

Moreover, three other states that have abolished capital punishment retain in their constitutions the right to deny bail either by reference to life imprisonment[190] as a ground for pretrial detention, or by naming offenses such as murder and treason in lieu of the former references to capital offenses.[191] Thus, bail may still be denied in many states for offenses that were formerly capital,[192] even after the death penalty is abolished. This gives rise to the suspicion that denial of bail in capital cases has a relation to dangerousness as well as to the likelihood of flight.

Furthermore, it is clear that the concept of a peace bond, where danger to the community can be considered, existed as far back as 1361.[193] The nonbailable offenses listed in the Statute of Westminster of 1275, the first bail statute, included most violent crimes.[194] One can thus argue that the first bail statute in Anglo-American history could well have been used for pretrial detention to protect society.[195]

In sum, persuasive evidence exists that danger to the community is an historical basis for the denial of bail, and this fact has been forgotten because of the basic federal statutory grant of the right to bail. If, however, it is correct to view the Constitution as permitting Congress to deny bail in certain cases, so long as the action is reasonable and not arbitrary, then it follows that

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bail in all cases except capital cases. Iowa Const. art. I § 12. Thus, the statute denying bail in a kidnapping for ransom case, when that offense is noncapital, conceivably could violate the state's constitution. There is no Iowa case in point. See also In re Perry, 19 Wis. 676 (1865) a case which held that abolition of capital punishment in Wisconsin rendered formerly capital offenses bailable under the state's constitution; State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958).

[190] Rhode Island Const. art. I § 9.

[191] Michigan Const. art. I § 15 (1965); Oregon Const. art. I § 14. West Virginia achieves the same result by statute. W. Va. Code § 62-1c-1 (1966).

[192] In addition to those states which have at least partially abolished capital punishment, bail may be denied in New York, by statute, in the court's discretion, supra note 29. In a problem similar to that posed for Iowa, supra note 189, the North Dakota constitution permits bail in all but capital cases, N. Dak. Const. art. 1 § 6, but by statute bail may be denied in cases of murder in the first degree. N. Dak. Century Code Ann. ch. 29-08 § 04 (1960). Including Wisconsin, supra note 189, in only five of the thirteen states where capital punishment has been abolished is there no constitutional or statutory means to deny bail for formerly capital offenses. Alaska Const. art. 1 § 11; Minnesota Const. art. I § 7; Minn. Stat. Ann. § 629.52 (1947); Vermont Const. ch. II § 32. In Hawaii the state constitution permits the court to release defendants without bail in all cases except those in which the punishment is life imprisonment. In those cases, apparently, a bail sum must be set. Hawaii Const. art. I § 9.

[193] The Justices of the Peace Act, 34 Edw. 3 c. 1 (1361). See also New York Judicial Council Report, supra note 169, at 142. The peace bond concept, although rarely utilized, still exists under federal law. 18 U.S.C. § 3043 (Supp. IV, 1969).

[194] 3 Edw. 1, c. 12 (1275). For a list of the offenses made nonbailable by the statute of Westminster, see New York Judicial Council Report, supra note 169, at 141.

[195] Id. at 142.

Congress can also adopt reasons unknown or unused in colonial times. Even if danger to the community was not a recognized release test in 1789, there would be no reason why Congress could not adopt it as a permissible test at a later date. This is precisely what Congress did in regard to capital cases under the Bail Reform Act in 1966.[196]

Another approach to determining the meaning of the eighth amendment is to examine the judicial interpretations it has received. The two most significant Supreme Court cases concerning the bail provisions of the eighth amendment are *Stack v. Boyle*[197] and *Carlson v. Landon*,[198] decided the same term.

In *Stack v. Boyle*, the petitioners were arrested for violation of the Smith Act[199] and were held on $50,000 bond each. On their motion to reduce bond, the issue before the Court was the question of excessiveness and not the issue of the right to bail. As a result, the comments made by the Court on that latter issue were essentially *dicta*. Nevertheless, because the opponents of pretrial detention so often cite the case, it is necessary to examine that *dicta*. The key statement from the majority opinion is:

> From the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure . . . federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[200]

At first glance, this statement seems to suggest constitutional difficulties for any pretrial detention statute. However, closer analysis reveals that the Court was talking not of the Constitution, but was referring solely to federal statutory law. The references to trial preparation and the presumption of innocence are really statements as to the policy reasons behind the development of the purely statutory right. Not only was *Stack* a case dealing with excessive bail, and its oft-quoted statement *dicta*, but the Court was not even talking about a constitutional right to bail.

Stack

*Carlson v. Landon*, argued just a few weeks after *Stack* was decided, concerned the power of the Attorney General to hold without bail, in his discretion, alien members of the Communist

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[196] See 18 U.S.C. § 3148 (Supp. IV, 1969).

[197] 342 U.S. 1 (1951).

[198] 342 U.S. 524 (1952).

[199] 18 U.S.C. § 2385 (1964).

[200] Supra note 197, at 4.

Party pending their deportation.[201] Since it dealt with the rights of aliens in deportation proceedings and was not a criminal case, it can be said that *Carlson*, like *Stack*, is not directly in point as to the right to pretrial bail. Nevertheless, the Court faced the issue of whether the eighth amendment granted a right to bail for aliens. Its statement on the point discussed the constitutional privilege and not statutory rights:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say that all arrests must be bailable.[202]

Although *Carlson* was not a pretrial criminal case, it did discuss the eighth amendment, and in no uncertain terms held that Congress could define those classes of cases where bail may be allowed. An examination of the federal and state cases raising the constitutional issue reveals that the weight of authority clearly follows this statement in *Carlson*.[203]

The meaning of the eighth amendment can also be seen from an examination of New York law. The only New York constitutional statement on bail is an excessive bail clause identical to that of the eighth amendment.[204] Unlike the federal law, New York statutory law sets up no right to bail in pretrial noncapital cases but leaves it to the court's discretion in all felony cases.[205]

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[201] Internal Security Act of 1950, Sept. 23, 1950, § 22, added by ch. 1024, 64 Stat. 1006.

[202] Supra note 198, at 545-46.

[203] Bloss v. Michigan, 421 F.2d 903 (6th Cir. 1970) (dictum, bail pending appeal); Mastrian v. Hedman, supra note 168 (capital case); United States ex rel. Covington v. Coparo, 297 F. Supp. 203 (S.D.N.Y. 1969) (capital case); United States ex rel. Fink v. Heyd, 287 F. Supp. 716 (E.D. La. 1968), aff'd, 408 F.2d 7 (5th Cir. 1969), cert. denied, 396 U.S. 895 (1969) (dictum, bail pending appeal); Wansley v. Wilkerson, 263 F. Supp. 54 (W.D. Va. 1967) (capital case); Dameron v. Harson, 255 F. Supp. 533 (W.D. La.), aff'd, 364 F.2d 991 (5th Cir. 1966) capital case); People ex rel. Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498 (1943); Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822 (1906) (dictum, bail pending appeal). Contra, United States v. Motlow, 10 F.2d 657 (7th Cir. 1926) (dictum, bail pending appeal); Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960) (right of juvenile to bail); United States v. Fiala, 102 F. Supp. 899 (W.D. Wash. 1951) (dictum, bail pending appeal).

[204] "Excessive bail shall not be required." N.Y. Const. art. 1 § 5.

[205] Supra note 29.

Inevitably, New York courts have had to face the issue of whether an excessive bail clause affords a right to pretrial bail.

The leading New York case is *People ex rel. Shapiro v. Keeper of City Prison.*[206] There bail had been denied outright to an alleged extortionist who had a long record of convictions, was facing a life sentence, and who had absconded once in the past. The petitioner argued that the denial of bail in a noncapital case was unconstitutional under New York law. The court of appeals rejected this contention, holding that the New York excessive bail clause, which follows the federal model, affords no right to bail, but merely forbids excessiveness. Note! In so holding, the court added that a statute making the grant or denial of bail discretionary would not, in itself, violate the constitutional ban on excessive bail.[207] Significantly, for the present issue, the court added that the statutory grant to the courts of the discretionary power to deny bail in felony cases did not mean that this power can be exercised arbitrarily. The court stated: "[d]enial of bail is no light matter, and needs to be buttressed by a real showing of reasons therefor . . . ."[208] The reasons indicated in the lower court were said to be sufficient.

A rationale similar to that put forth by the New York Court of Appeals can be used to support pretrial detention in the federal courts. The constitutional requirements are identical, and the classes of cases where detention is possible are far narrower under the D.C. Crime Act than under the New York statute which permits denial in all felonies The reasons that are put forth in individual detention cases will have to indicate dangerousness (*i.e.*, the prior convictions in *Shapiro*) and a high probability of guilt must be shown under the federal statute, a factor not required by the court in *Shapiro.* It is clear that the D. C. Crime Act contemplates pretrial detention in far fewer cases than those suggested by *Shapiro.*

In sum, it appears that the eighth amendment does not grant a right to bail, and that pretrial detention is possible if utilized in a rational and nonarbitrary manner. This view is supported both by history and case law.

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[206] 290 N.Y. 393, 49 N.E.2d 498 (1943).

[207] Other New York cases reaching the same result are People ex rel. Klein v. Krueger, 25 N.Y.2d 497, 255 N.E.2d 552, 307 N.Y.S.2d 207 (1969); People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 71 N.E.2d 423 (1947); People ex rel. Fraser v. Britt, 289 N.Y. 614, 43 N.E.2d 836 (1942); People v. Melville, 62 Misc.2d 366, 308 N.Y.S.2d 671 (Crim. Ct. 1970). The Melville case is noteworthy because it articulates danger to the community as a permissible release test and holds that, on the showing of a clear and present danger to the community which might result from the defendant's freedom, it is the duty of the court to deny bail. Id. at 373, 308 N.Y.S.2d 671, 678. The new New York bail statute casts doubt on this part of the Melville holding. Supra note 29.

[208] Supra note 206, at 398, 49 N.E.2d at 501.

### B. *Due Process*

It is axiomatic that individual liberty cannot be restricted without due process of law; it is also axiomatic that due process does not mandate noninterference with individual freedom.[209] The test to be applied to determine if due process has been violated by a statute is the reasonableness of the balance struck between the conflicting right of the untried individual defendant to freedom, and the competing right of society to protection from criminal acts or similar risks. The pretrial detention provision of the D. C. Crime Act strikes this balance.

Congress and the several states have been balancing these rights ever since the nation was first created. There are numerous statutes, in situations analogous to pretrial bail, where individual freedom is denied prior to any conviction without running afoul of due process. Moreover, most of these statutes are not limited to sixty-day periods of detention and few, if any, carry the safeguards present in the D.C. Crime Act. A prime example, as relevant here as it is in the eighth amendment discussion, is the traditional denial of pretrial release for those charged with capital offenses. If the sole reason for denial of bail in capital cases is the heightened risk of flight when life is at stake, society exacts a heavy price on individual freedom to protect its right to have an accused present for trial. Society's right to protect itself from future criminal acts should, at the least, be equal to that of requiring a defendant to appear for trial. As has been noted, pretrial bail has been denied in capital cases for as long as the Constitution has existed,[210] and virtually every state that has a constitutional right to pretrial bail specifically excepts capital cases.[211] Furthermore, Congress, as recently as 1966, made danger to the community a specific and articulated test for release in capital cases.[212] No court has ruled that the denial of bail in capital cases under these statutes violates due process.

Congress and the states have also traditionally permitted the courts to deny pretrial release by setting financial release conditions which often cannot be met. This, too, is defended as an end which serves the public interest in reasonable assurance of the accused's appearance for trial.[213] Under the Bail Reform Act, an accused in a noncapital case may also have his pretrial freedom limited by a condition that he "return to custody after specified hours."[214] The intent is to permit limited release so that the accused can work and support his family,[215] but it also means daily incarceration after work and on weekends. This loss of freedom is intended to assure presence for trial, and it too has not been challenged on due process grounds. It should be stressed that detention in capital cases, on financial release conditions and after specified hours, can and does continue far beyond any sixty-day limit. It would seem, then, that society's right to require a defendant's presence for trial is often sufficient to obviate the accused's claim to pretrial freedom, and that such detention is reasonable in terms of due process.[216]

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[209] See Zemel v. Rusk, 381 U.S. 1, 14 (1965).

[210] Supra note 165.

[211] See list set out in Bail in the United States, supra note 4, at 2-3, n. 8.

[212] 18 U.S.C. § 3148 (Supp. IV, 1969).

[213] Allen v. United States, 386 F.2d 634 (D.C. Cir. 1967).

There are, in addition, many statutes throughout the nation that result in loss of freedom in a variety of situations. Such statutes are generally defended on the theory of society's right to protection. Prime examples are statutes authorizing the widespread involuntary hospitalization of the mentally ill.[217] Many of these statutes merely require a hearing before a judicial officer,[218] and a number of jurisdictions permit emergency short-term incarceration for observation, often only on the basis of affidavits.[219] In the District of Columbia there is a statute authorizing pretrial commitment for a mental test of persons charged with crimes, based solely on the court's observations of the accused or prima facie evidence produced.[220] This detention usually lasts sixty days and has never been held to violate due process. A number of United States jurisdictions permit the involuntary incarceration of alcoholics[221] and drug addicts.[222]

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[214] 18 U.S.C. § 3146(a)(5) (Supp. IV, 1969).

[215] H.R. Rep. No. 1541, 89th Cong., 2d Sess. 4 (1966).

[216] Bitter v. United States, 389 U.S. 15 (1967). Another basis for denial of freedom is the broad power vested in trial judges to ensure the orderly and expeditious progress of a trial. For this purpose a judge can revoke bail and remit a defendant to custody if the defendant's conduct endangers the orderly progress of the trial. Threats to witnesses are a prime example of such danger. Carbo v. United States, supra note 130; United States v. Gilbert, supra note 132.

[217] Federal law, for example, authorizes indefinite commitment of persons charged with offenses who are found to be incompetent to stand trial and whose release would "probably endanger the safety of the officers, the property or other interests of the United States. . . ." 18 U.S.C. § 4247 (1964). This statute was upheld by the Supreme Court in Greenwood v. United States, 350 U.S. 366 (1956).

[218] E.g., Conn. Gen. Stat. Ann. § 17-178 (Supp. 1970); Ann. Laws of Mass. ch. 123 § 51 (1968); Mich. Stat. Ann. § 14.811 (Supp. 1970); N.Y. Mental Hygiene L. § 72 (McKinney Supp. 1969); Ohio Rev. Code Ann. § 5122.15 (Page 1970).

[219] E.g., Minn. Stat. Ann. § 253A.04 (Supp. 1970); Mo. Stat. Ann. § 202.803 (Verron Supp. 1969); Pa. Stat. Ann. tit. 50 § 4405 (Purdon 1969).

[220] P.L. 313, 84th Cong., 1st Sess., approved August 9, 1955, D.C. Code Ann. tit. 24 § 301(a), 69 Stat. 609, ch. 673, § 1.

[221] E.g., Conn. Gen. Stat. Ann. § 17-155g (Supp. 1970); Mich. Stat. Ann. § 14.811 (Supp. 1970); Tex. Civ. Stat. art. 5561(c) § 9 (Vernon 1958).

[222] E.g., Cal. Codes Ann. § 6357 (West Supp. 1970); Nev. Rev. Stat. § 433.280 (1967); Gen. Laws of R.I. § 21-28-57 (1968).

regulatory detention upheld

In addition, several permit detention of the mentally retarded,[223] epileptics,[224] and sexual psychopaths.[225] There is even one state where one can be held for having tuberculosis.[226] Most of these statutes do not require prior convictions and are generally couched in terms of protection of the individual involved or of society. Due process has not been found to be a bar to these statutes.[227]

Thus, it is clear that the due process clause of the Constitution does not forbid reasonable restrictions on liberty, whether they are intended to assure appearance for trial or to protect society. Pretrial detention, under the D.C. Crime Act, for the protection of society fits within these established precedents.

Before any pretrial detention proposal can be deemed reasonable, certain procedural elements of due process have to be considered. First, the categories chosen should reflect anticipated harm from recidivism in order to justify the burden of detention. Second, appropriate procedural safeguards are necessary to assure that only those who pose a danger to society are detained. Third, the statute should minimize, to the extent feasible, the effects of pretrial detention. The D.C. Crime Act amply meets these requirements.

The categories chosen stress danger to the person and each gives some indication of potential recidivism. Detention of persons charged with such minor offenses as petty larceny or passing bogus checks would not justify the initiation of detention proceedings because the anticipated harm arising from this form of property loss does not reach the level of danger to society that properly can require the imposition of loss of freedom. However, when a serious crime such as rape, robbery, burglary, or arson is charged, and other evidence exists showing a proclivity for repeated criminal acts, the present charge, involving as it does physical danger, creates a situation where society's interest in self-protection outweighs the individual burden of detention.

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[223] E.g., Ga. Code Ann. § 88-2507 (Supp. 1969); Minn. Stat. Ann. § 253A.07 (Supp. 1969); Tenn. Code Ann. tit. 33 § 501 (Supp. 1969).

[224] E.g., Mich. Stat. Ann. § 14.811 (1970 Supp.); Mo. Stat. Ann. § 211.201 (Vernon Supp. 1969); Code of Laws of S.C. § 15-1422 (1962).

[225] E.g., Code of Ala. tit. 15 § 438 (1959); N.H. Rev. Stat. Ann. § 173-A:6 (Supp. 1969); Ore. Rev. Stat. § 426.610 (1969).

[226] Ga. Code Ann. § 88-704 (Supp. 1969). Detention under this statute is limited to those persons with tuberculosis who are first made aware of Department of Health rules and are disobeying them.

[227] The problems raised by these statutes are not over the question of whether confinement is permissible. Instead they concern issues of procedural due process such as proper notice, hearing and the like. See Note, Hospitalization of the Mentally Ill: Due Process and Equal Protection, 35 Brooklyn L. Rev. 187 (1969); Note, Due Process for the Narcotic Addict? The New York Compulsory Commmitment Procedures, 43 N.Y.U.L. Rev. 1172 (1968); Comment, The New Mental Health Codes: Safeguards In Compulsory Commitment and Release, 61 Nw. U.L. Rev. 977 (1967).

As noted, each category of detainable offenses involves the threat of serious bodily harm or even death. Although statistical evidence is limited, there are indications that those charged with robberies, as a class, show a high incidence of recidivism,[228] and the National Bureau of Standards Study indicated a decidedly higher rate of recidivism for those charged with the offenses denominated as "dangerous crimes" and "crimes of violence" than for other offenses.[229] Moreover, when detention is predicated on a charge of a "crime of violence" there is evidence present of a tendency to commit such crimes because a similar crime committed in the recent past is a prerequisite for this category.[230]

As to procedural safeguards, due process necessitates that prior to deprivation of liberty, that a person be afforded an adversary hearing accompanied by such rights as the assistance of counsel and the opportunity to offer evidence in his own behalf.[231] An examination of the hearing and other rights afforded the defendant by the D.C. Crime Act, as set forth in the preceding section of this article,[232] indicates that the statute more than complies with procedural due process.

It should be noted that it has been charged that when a court determines that a defendant poses a danger to the community, this finding transforms the judge into a prognosticator of future behavior, that such predictions are impossible to make accurately, are both unprecedented and unreliable, and constitute a denial of due process of law.[233] However, even a cursory look at our judicial system indicates that we call upon our judges to make numerous predictions of future behavior from the point of the first appearance after arrest through the final sentencing, and this has never offended notions of due process. The Bail Reform Act itself is replete with predictions of future acts. The judicial officer under present law must make a prediction as to the likelihood of flight as to every defendant who appears before him. How it is any easier or more reliable to predict the risk of a criminal act such as bail-jumping, than it is to predict the risk of any other crime committed on bail is exceedingly difficult to perceive.

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[228] See text at notes 47-48, supra.

[229] National Bureau of Standards Study, supra note 21, at 136.

[230] D.C. Crime Act, supra note 1, § 23-1322(a)(2). The potential impact of these categories in terms of persons actually detained can be expected to be quite low. This author conducted a limited survey of all persons charged with offenses in the District of Columbia during a two week period in the spring of 1969. Of 459 persons charged during that two week period, only 44 fit the detention hearing categories. Motions for pretrial detention hearings thus would have been possible under the categories set forth in the D.C. Crime Act for slightly less than 10 per cent of all persons charged. This study was most informal and because of the difficulty in obtaining information (see National Bureau of Standards Study, supra note 21, at 79-80) it is conceivable that the total number detainable could be slightly higher. However, because of the procedural safeguards set forth in the Act, substantially fewer than this 10 per cent can be expected to be ordered detained.

[231] Specht v. Patterson, 386 U.S. 605 (1967) (habitual sex offender commitment proceeding); Chandler v. Fretag, 348 U.S. 3 (1954) (habitual offender sentencing procedure).

[232] See text at notes 135-58, supra.

[233] Hearings on Preventive Detention, supra note 16, at 418-19 (Statement of David B. Isbell).

predictions

An even more apropos example from the Bail Reform Act is the prediction the judicial officer is called upon to make in all capital cases. Here, the same judicial officer who is said to be unable to predict danger to the community in a pretrial noncapital case, is directed to consider that very same question in the context of a capital case.[234] Thus, Congress has already found the judicial officer competent to predict a defendant's potential danger to the community in certain pretrial cases. To say that a judge can predict reliably in one pretrial situation and not in any other is clearly anomalous. The judicial officer must also predict the dangerousness of a defendant seeking bond pending appeal.[235] Further, every time a judge imposes or suspends a sentence, or grants or denies probation, he makes a prediction of future behavior and of the possibility of rehabilitation. The intervention of a conviction does not make a prediction as to future acts less difficult or more reliable.

If a judicial officer can predict danger to the community by a defendant charged with a capital offense, or by a defendant seeking bond pending appeal, or by a defendant before him for sentencing, then he can predict with equal reliability the dangerousness of a defendant charged with a noncapital offense. This is precisely what the pretrial detention proposal calls on the judge to do, and it is precisely what his training and experience qualifies him to do. Such predictions are anything but a novelty in our system and do not violate due process of law.

As to the final consideration, that the statute minimizes the effects of pretrial detention, the outline of the Act, presented earlier, makes it clear that by including such provisions as a sixty-day limit on detention, free access to counsel and the right to a limited period of release to search for evidence and witnesses,[236] this element of due process is also satisfied.

In sum, it is submitted that the pretrial detention section of the D.C. Crime Act fully complies with all due process requirements of the fifth amendment.[237]

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[234] 18 U.S.C. § 3148 (Supp. IV, 1969).

[235] Id.

[236] See text at notes 160-61, supra.

## CONCLUSION

The pretrial detention section of the D.C. Crime Act affords a unique opportunity to answer some of the most challenging questions in the criminal justice system. First, it provides a vehicle for determining if the concept of pretrial detention of the dangerous defendant is constitutional. Second, it tests the ability of the courts to identify those who are dangerous and to try them with dispatch. If the dangerous offenders are identified and incarcerated, a measurable drop in the Washington crime rate can be expected although, obviously, pretrial detention is far from the sole solution to the problem of crime. Perhaps, even more important, there will be an end to the rampant hypocrisy that, of necessity, permeates the present day bail system. Respect for the law will be heightened when the dangerous offender is detained because of his dangerousness and not on some sham excuse.

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[237] Another constitutional problem, analogous to the due process issue, was suggested by Prof. Foote in his article, The Coming Constitutional Crisis in Bail, supra note 169. This concerns the applicability of the doctrine of Griffin v. Illinois, 351 U.S. 12 (1956), to the money bail system. Griffin held that, under the equal protection clause of the fourteenth amendment, a state could not deny an indigent the benefits of appellate review merely because he could not afford the costs of preparing a transcript. The Griffin case has recently been extended to prohibit forcing an indigent to serve more than the maximum term specified by statute in order to satisfy a fine or court costs he cannot pay. Williams v. Illinois, 399 U.S. 235 (1970). Clearly the rationale applied in Griffin and Williams could be applied to bail where many defendants are incarcerated before trial simply from inability to raise money. Other defendants charged with the same offenses go free if they can post the bond. Griffin, however, has not as yet been applied to bail and the courts show little inclination to do so. See, e.g., McCarroll v. Faust, 278 F. Supp. 448 (E.D. La. 1968); Reeves v. Alaska, 411 P.2d 212 (Alaska 1966); Wallis v. Genung, 198 So. 2d 30 (Fla. 1967). The equal protection clause has also generally been held not to bar requiring a defendant held on money bond to stand a lineup. United States v. Jones, 403 F.2d 498 (7th Cir.), cert. denied, 394 U.S. 947 (1968); Rigney v. Hendrick, 355 F.2d 710 (3d Cir.), cert. denied, 384 U.S. 975 (1966). Contra, Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964). Nor does it bar interrogation of a defendant unable to post bond. United States ex rel. Priest v. The Dep't of Corrections of State of Del., 268 F. Supp. 242 (D. Del.), aff'd, 390 F.2d 150 (3d Cir. 1968).

Among the reasons for the reluctance to extend Griffin may be the fact that high money bond is the sole method available to detain dangerous defendants. In addition, most state constitutions grant a right to bail and constitutions can not be amended as easily as statutes can be changed. Moreover, there are situations where the only way to detain a defendant with a high risk of flight (e.g., an alien charged with smuggling narcotics) may be through money bond. In such cases, money bond could be higher than the defendant is able to pay and still be reasonable in light of society's right to require the defendant to stand trial. Williams, it should be noted, did not bar imprisonment in lieu of all fines for the indigent, only imprisonment for a term greater than the maximum applicable. Faced with these problems, the courts may be wary of such a revolutionary decision. The absence of a constitutional right to pretrial bail in federal cases coupled with the pretrial detention provisions of the D.C. Crime Act eliminates some of these obstacles, and it is conceivable that the Griffin rationale could be used to provide the death knell to money bond in the District of Columbia. At least one judge of the Circuit Court of Appeals for the District of Columbia has already indicated that he favors such an extension of the equal protection clause. Pannell v. United States, 320 F.2d 698 (D.C. Cir. 1963) (Bazelon, C.J., concurring in part and dissenting in part). Such a decision would be detrimental in those situations where a high risk of flight exists. The fact that the equal protection clause applies only to the states should not be an obstacle because equal protection and due process, which both stem from the basic ideal of fairness, are not mutually exclusive and discrimination can be so unjustifiable as to violate due process. Bolling v. Sharpe, 347 U.S. 497 (1954). See also Hamilton Nat'l Bank of Wash. v. District of Columbia, 176 F.2d 624 (D.C. Cir. 1949). Extension of Griffin to pretrial bail cases would, in effect, mandate an end to money bail and would eliminate the major source of pretrial detention.

over enthusiastic ?

Finally, it is submitted that pretrial detention can play an important role in liberalizing bail practices. By enabling the courts openly to detain those who are dangerous, it will encourage greater use of release on recognizance and other nonfinancial conditions and thus, it can advance the Bail Reform Act goal of ending needless pretrial detention. Detaining the dangerous can thereby result in a significant reduction in the number of defendants held prior to trial. It can also be expected that the states will follow a successful federal example and adopt not only the pretrial detention features of the D.C. Crime Act, but also the liberal release provisions of the Bail Reform Act which they have proved so reluctant to do.[238]

Pretrial detention of the dangerous defendant is the next logical step after the Bail Reform Act, filling in its most serious gap. If the new law succeeds in reducing both crime on bail and the total number of pretrial detentions, then the final step in the revolution in bail law—the complete elimination of money bail—may be possible.

## APPENDIX

### STATE RELEASE STATUTES ADOPTED SINCE THE PASSAGE OF THE BAIL REFORM ACT

*Arizona:* Under a recently adopted statute, any person free on bail charged with a felony must have his release conditioned on good behavior [Ariz. Rev. Stat. Ann. § 13-1577D (Supp. 1969)] and may have his release revoked and be detained pending trial if there is probable cause to believe that he has committed another felony during the period of his pretrial release. Id. § 13-1578B. Perhaps, because this new Arizona statute may conflict with the state's constitutional provision mandating bail in all noncapital cases [Ariz. Rev. Stat. Ann. Const. art. 2, § 22

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[238] Supra note 29.

(1956)], a constitutional amendment has also been proposed permitting the denial of bail for "[f]elony offenses, committed when the person charged is already admitted to bail on a separate charge. . . ." Ariz. Rev. Stat. Ann. Prop. Amend., Const. art. 11, § 22 (Supp. 1969). The amendment was approved in the November 3, 1970, Arizona general election.
*Delaware:* In 1968 a statute was passed to reform bail practices and to encourage the use of personal recognizance. However, the statute adds community safety to risk of flight as the test for setting release conditions. Del. Code Ann. Tit. 11, § 2101 (Supp. 1968). Using community safety as a test for setting money bail, as the Delaware statute does (id. § 2107), in essence, legislates the old money bond system, a step specifically rejected by the Bail Reform Act and by the D.C. Crime Act. See D.C. Crime Act, supra note 1, at § 23-1321(a).
*Florida:* Under a recent constitutional amendment denial of bail is permitted in cases where the potential punishment is life imprisonment. Fla. Stat. Ann. Const., 1968 Revisions, art. 1, § 14 (Supp. 1969).
*Georgia:* In 1969, Georgia granted authority to the court to release a defendant on his recognizance but the release decision was specifically left to the discretion of the judge. Ga. Ann. Code § 27-911 (Supp. 1969). This revision does not expand the concept of pretrial detention beyond capital crimes nor does it legislate community safety as a release criterion. Furthermore, the revision does not adopt fully the Bail Reform Act concept requiring release on recognizance to be the first priority of release.
*Hawaii:* Under a constitutional amendment adopted in 1968 the courts are permitted to dispense with bail in all cases except those in which the punishment may be life imprisonment. Hawaii Rev. Stat. Const. art. 1, § 9 (Supp. 1969).
*Maryland:* A recently enacted statute allows the accused two chances at bail on felony charges before revoking his release on an arrest for a third felony. Md. Ann. Code Art. 27 § 616½ (Supp. 1969). Although limited in scope, the Maryland statute is clearly a form of pretrial detention.
*Massachusetts:* In 1966, Massachusetts became the only state to turn to personal recognizance as the preferred method of release in recent years. The statute requires release on recognizance, unless the judge finds that such release will not assure the appearance of the accused. First passed as a temporary law [Ann. Laws of Mass. ch. 276 § 42 (Supp. 1969)], the statute was made permanent in 1970. Ch. 449 (Acts of 1970), the Comm. of Mass., eff. July 1, 1970.
*Michigan:* The recently enacted Michigan bail statute entirely avoids the subjects of release on recognizance and pretrial detention. Mich. Stat. Ann. Code of Crim. Proc. § 28.893 (Supp. 1970).
*Montana:* The recent revision of the Montana bail law limits the concept of pretrial detention to capital crimes. In addition the statute does not grant legislative recognition to community safety as a release criterion. Mont. Ann. Code § 95-1106 (Supp. 1969).
*Nevada:* The current Nevada statute treats the subject of bail without reference to the concepts of release on recognizance or pretrial detention. Nev. Rev. Stat. § 171.186 et seq. (1967).

*New Hampshire:* The revised New Hampshire bail law although calculated to encourage release on recognizance, restricts that form of release in felony cases to a defendant who satisfies several conditions including that "he is of such condition, both physical and mental, that his release will jeopardize neither himself nor the public." N.H. Rev. Stat. Ann. § 597:6-a, I (Supp. 1969). Thus, the burden is placed on the accused to prove his eligibility for release without being required to post a money bond. While this test concerning public safety is only applicable to release on recognizance, and not to a determination of a bail sum, years of experience with money bond teaches that its use for community protection can be expected.

*New York:* The New York statute presents an interesting example of recent bail legislation. Under § 553(2) of the present Code of Criminal Procedure (McKinney Supp. 1969), bail in all felonies is discretionary. The statute is silent on the proper grounds for total denial of bail, but in one recent case danger to the community was given as a proper reason in addition to risk of flight. *People v. Melville*, 62 Misc. 2d 366, 308 N.Y.S.2d 671 (Crim. Ct. 1970). New York empowered a commission to revise its criminal code, and in 1968 a new code was proposed which retained discretion in the courts to deny bail in all felony cases. Proposed New York Criminal Procedure Law, 1968 Study Bill and Commission Report §§ 285.30(2), 285.50(2). The proposal also set forth two distinct grounds for exercise of that discretion; first, risk of flight [id. § 275.30 (2)(a)], and second, danger to society [id. § 275.30(2)(b)]. Opponents of pretrial detention succeeded in eliminating danger to society as a release test when the Criminal Procedure Law was finally adopted by the legislature in 1970. N.Y. Times, April 14, 1970 p. 1, col. 2 (city ed.). The new bail law, as enacted, retains discretion in the courts to deny pretrial bail on a basis of risk of flight only, thus casting some doubt on the continuing validity of the holding in *Melville*. Supplement to Official Edition Law Reports and Sessions, Criminal Procedure Law, ch. 996, Laws of 1970 §§ 530.20(2), 530.40(2), 510.30(2). It has been demonstrated that courts are not loathe to set high bail for allegedly dangerous defendants denominating them flight risks. Total denial of bail on this basis under the new New York statute, as well as the use of high bail, remains possible and likely. It is also clear that by retaining discretion in the courts to deny bail on any ground, New York has rejected the Bail Reform Act and has also passed up the opportunity to deal openly with the problem of the dangerous offender.

*Vermont:* The Vermont Legislature revised that state's bail laws by enacting the Bail Reform Act virtually word for word with the significant addition of one phrase permitting the judicial officer to consider whether "the release of the person will constitute a danger to the public." Vt. Stat. Ann. § 7553a(a) (Supp. 1969). The obvious effect of this language is to reject the Bail Reform Act's emphasis on release on recognizance or unsecured appearance bond to assure appearance.

This survey clearly indicates that, far from adopting the Bail Reform Act as a model, the bulk of the state enactments in recent years have either taken small initial steps towards expanding the legal means of pretrial detention, or have only tentatively moved to an expanded use of release on recognizance.